Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

FREDERICK JAMES MOORE,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

On Petition for a Writ of Certiorari To The Maryland Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

W. BRADLEY NEY
1200 New Hampshire Ave., N.W.
Washington, DC 20036
(202) 776-2280

ALBERT H. TURKUS
Counsel of Record
KENNETH W. GIDEON
JULIA M. KAZAKS
DONALD P. SALZMAN
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7000

Attorneys for Petitioner Frederick James Moore

QUESTIONS PRESENTED

1. Whether the majority below correctly held, in acknowledged conflict with other state courts of last resort, that there was no violation of an indigent criminal defendant's right to due process of law, right to equal protection of law, or right to counsel when he was denied state funds for expert assistance because he was represented by private counsel, rather than a Public Defender?

2. Whether any implied waiver of an indigent criminal defendant's constitutional right to state-funded expert assistance was invalid, where the trial court denied the defendant's pretrial application for expert funds without taking any steps to establish that the defendant understood that he could secure access to the requested funds by proceeding to trial with Public Defender representation rather than private counsel?

PARTIES TO THE PROCEEDINGS

This matter involves no entities required to be identified under Rule 29.6.

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FREDERICK JAMES MOORE,

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STATE OF MARYLAND,

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To The Maryland Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Frederick James Moore hereby petitions for a writ of certiorari to review the judgment of the Maryland Court of Appeals in this case.

OPINIONS AND ORDERS BELOW

The opinion of the Maryland Court of Appeals (App. 1a-84a, including dissent) is reported at 390 Md. 343, 889 A.2d 325 (2005). The order of the Maryland Court of Appeals denying reconsideration is reproduced at App. 1b-3b, including the mandate. The opinion of the Maryland Court of Special Appeals (App.1c-30c) is reported at 154 Md. App. 578, 841 A.2d 31(2004). The transcript of the relevant portions of the hearing conducted by the Circuit Court of

Howard County, Maryland at which the court denied the requested relief is reproduced at App. 1d-9d.

JURISDICTION

The Maryland Court of Appeals entered judgment on December 14, 2005. That court issued an order denying Petitioner's Motion For Reconsideration on February 3, 2006, and issued its mandate on February 3, 2006. (App. at 1b-3b.) This Court has jurisdiction to review on certiorari the Maryland Court of Appeals' judgment and order pursuant to 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The Sixth and Fourteenth Amendments to the United States Constitution; §§ 1, 2, 4, and 7 of Article 27A of the Maryland Code; and Maryland Rule 1-325(b) are reproduced at App. 1e-13e.

STATEMENT OF THE CASE

This case presents an evenly divided conflict among the six highest state courts that have considered an important federal question affecting the fundamental constitutional rights of indigent criminal defendants. Over strong dissent, the court below held that an indigent defendant's right to due process of law, right to equal protection of law, and right to counsel were not violated when the defendant was denied state-funded expert assistance on the ground that he was represented by retained private counsel rather than by a state Public Defender. That ruling is in direct, acknowledged conflict with three other state courts of last resort and with lower appellate state courts in other jurisdictions, and improperly restricts the effect of this Court's opinions in *Ake v. Oklahoma*, 470 U.S. 68 (1985) and *Wheat v. United States*, 486 U.S. 153 (1988). The case also presents a second

important federal question concerning the requirements for effecting a valid waiver of the right to expert assistance established by the Court's opinion in *Ake*.

Petitioner Frederick James Moore, facing trial for first degree murder in Maryland, requested public funds for expert assistance to respond to the State's forensic DNA evidence. Although Moore's indigence was uncontested – indeed, he was incarcerated and unemployed – the trial court denied Moore's request. The court held that because Moore was represented by private retained counsel (whose fee was a traffic accident settlement that he had recently secured on Moore's behalf), rather than by the state Public Defender, he was not eligible for public funding of his defense costs. Moore proceeded to trial with his private counsel and without a DNA expert of his own. He was convicted and sentenced to life in prison.

During the hearing on his funding request, the trial court did not engage in any colloquy with Moore on the record, or otherwise take any steps to determine whether Moore understood that he could obtain access to the requested funds by proceeding to trial with the Public Defender instead of his retained private counsel.

Moore's Trial

Moore was charged with the murder of Ashley Nicole Mason, who was killed in an apparent stabbing and strangulation. The analysis of DNA evidence was central to his prosecution. At trial, the State presented witness testimony that Moore and another man, Scott Brill, were seen leaving a party with Mason, and returning later without her, the night before her body was found. The State attempted to prove Moore's involvement in the murder with forensic DNA analysis allegedly linking Moore to the victim,

to the crime scene, and to the weapon. Other evidence tended to suggest that Brill was the more likely perpetrator, and Moore's trial defense centered around the theory that Brill acted alone. Brill was separately tried and convicted.

The State's DNA Evidence

The State presented its DNA evidence through the expert testimony of Dr. Robin Cotton, the director of the contract laboratory that compared DNA found in crime scene samples to that of Moore, Brill, and others. Dr. Cotton's testimony tended to implicate Moore, but her conclusions were far from unequivocal, in part due to ambiguities that can arise when analyzing samples containing more than one person's biological material ("mixed-source DNA"). For example, Dr. Cotton testified that DNA on a knife alleged to be the murder weapon was consistent with Moore's DNA, but she stated that the "conclusion is sort of partial." Ct. App. E 156. Dr. Cotton explained, "it's possible that he's there, but I can't definitively say that." Ct. App. E 197. Similarly, Cotton could not definitively include or exclude Brill's DNA profile from the knife sample. App. 11a. Cotton reported that analysis of other samples yielded a variety of results. In some cases Moore's DNA was identified as consistent with the samples, in other cases Moore's DNA was excluded, and in other cases the results were partial or inconclusive. App. 11a-12a.

Dr. Cotton also testified that the interpretation of some DNA analysis results was subjective: "[S]omeone might have said, 'We think this person is included, even though we don't have all the data' ....[P]erhaps another lab would have said, 'Well, we think that's not enough and that's inconclusive.'" Ct. App. E 180. She stated that samples of mixed-source DNA in particular "are difficult to interpret,"

and "you are making judgment calls as you do that." Ct. App. E 200.

Dr. Cotton's testimony, which spanned 118 pages of the trial transcript, was far more extensive than that of any other State witness. In fact, the State's DNA evidence, and the inferences therefrom, were so essential to its case that the prosecutor suggested that the jury could convict Moore "without any testimony at all."[1] Trial Transcript 5-113.

Moore was unable to retain, and therefore did not call, an expert DNA witness of his own.

Moore's Pretrial Request For Expert Funds

Moore made his indigence clear when his counsel filed a motion (the "Funding Motion") requesting that the court or the Office of the Public Defender provide funds for Moore to retain a DNA expert. Ct. App. E 039-042. The Funding Motion stated that Moore's privately retained counsel,

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[1] At trial, the State attempted to establish Moore's role in Mason's murder by offering the testimony of two witness. Both witnesses were impeached by defense counsel during cross-examination.

The first witness initially claimed that Moore had admitted that he and Brill committed the crime, but was confronted during cross-examination with his grand jury testimony that Brill, not Moore, had confessed to Mason's murder. App. 13a and n.6. The State's second witness had been diagnosed with schizofrenform, a precursor to schizophrenia. This witness testified that she sometimes "heard voices" during the period about which she testified. This witness responded at least nine times on direct examination that Moore did not identify who stabbed Mason. She then tearfully succumbed to the State's repetitive and pressured examination, testifying that Moore had confessed – only to retract this statement immediately during cross-examination and deny that Moore had admitted any role in Mason's murder. Trial Transcript 3-181 to 3-183.

Sheldon Mazelis, had been Moore's attorney in a personal injury lawsuit arising from an auto accident in which Moore was injured. Ct. App. E 039. The motion stated, "Only do [sic] to the fact that the defendant was do [sic] to receive and in fact received funds" from that settlement "was the defendant able to pay a fee to private counsel." Ct. App. E 039. In fact, the Public Defender already had determined Moore's indigence and represented Moore before Mazelis entered an appearance. Ct. App. E 095.[2] As the Funding Motion stated, "BUT FOR THE FACT THAT HE IS POOR AND COMES FROM A POOR FAMILY," Moore would have hired an expert. Ct. App. E 040 (uppercase in original).

In the Funding Motion and the hearing on the motion, Mazelis argued that there would be "serious[] prejudice[]" to Moore if he were "not allowed to have an expert as the State is allowed to have an expert." Ct. App. E 040, App. 2d. The State took no position on Moore's funding application. App. 4d. Citing the Public Defender's policy to deny funds for experts in all private counsel cases, the Public Defender opposed the request. App. 5d-7d.

During the hearing on the Funding Motion, no one contested Moore's claims of indigence, or his claim that he needed the assistance of a DNA expert.[3] However, at no time during the hearing did anyone (1) inform Moore that he could replace Mazelis with a Public Defender in order to

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[2] The Public Defender also initially represented Moore in this appeal before the expert funding issue surfaced as a potential conflict. Undersigned counsel are appearing as assigned public defenders.

[3] In fact, after hearing Moore's request for funds and the Public Defender's reasons for opposing the request, the court left the bench to determine whether judicial funds were available "to provide for the expert in this case." App. 7d-8d.

receive expert services; (2) suggest to Moore that he do so; or (3) confirm that Moore understood the consequences of proceeding to trial with private counsel. Moore did not speak, or appear to be directly spoken to, at any point during the hearing, and there was no discussion between counsel and the court concerning Moore's relinquishment of the right to state funds for an expert.

The trial court stated that "there are no court funds dedicated or available to provide in general for experts in cases where an individual will have private counsel and, specifically, there are not funds available – court funds available to provide for the expert in this case." App. 8d. The court also ruled that it would not order the Public Defender to provide Moore with funds for an expert. *Id.*

The Opinion Of The Maryland Court of Special Appeals

Moore appealed, arguing that the trial court's denial of his funding request was improper on both statutory and constitutional grounds. App. 7c. The Maryland Court of Special Appeals affirmed the trial court's ruling in an opinion filed January 28, 2004. App. 1c-30c.

The Court of Special Appeals acknowledged that other states' courts had reached varying conclusions as to the scope of an indigent defendant's right to expert funding while represented by private counsel. App. 9c-14c. It then concluded that the state Public Defender statute set forth at Article 27A of the Maryland Code was a "unified enactment" and that "any funding for the necessary services associated with representation are conditioned on representation by the Public Defender." 14c-15c.

The court then rejected Moore's constitutional claims. The court concluded that the State's DNA analysis, and the State's expert witness, constituted sufficient expert assistance

for Moore. App. 22c. The court found that access to an expert, even if not the defendant's own expert, satisfies *Ake*. App. 23c-25c. The court reasoned that "[t]he State provided expert analysis, and any constitutional duty had ended after that point." App. 22c.

The Opinion Of The Maryland Court of Appeals

Moore appealed the intermediate appellate court's ruling to the Maryland Court of Appeals, Maryland's appellate court of last resort. Again, he argued that the funding denial was improper on statutory grounds and also because it violated his right to due process of law, his right to equal protection of law, and/or his right to counsel. He also asserted that he did not validly waive his right to expert assistance by proceeding with retained counsel instead of seeking substitute Public Defender counsel, having not been party to "a colloquy on the record establishing that the defendant understands the implications for his fundamental constitutional rights of choosing retained counsel over appointed counsel." Moore Ct. App. Br. 34.

The Maryland Court of Appeals affirmed the intermediate appellate court's ruling in an opinion filed December 14, 2005. App. 1a-84a. In many respects, the Court of Appeals agreed with Moore on threshold matters concerning a defendant's right to expert assistance, but the court concluded that the right to such assistance could properly be conditioned on Public Defender representation.

The Court of Appeals first elaborated on the scope of rights to expert assistance flowing from *Ake*. It declared that the right to expert assistance is not limited to capital cases or to psychiatric experts, and described in detail the showing a defendant must make to prove that the requested assistance is

needed in the factual context of a particular case. App. 23a, 26a, 26a-30a.

The Court of Appeals then rejected Moore's statutory analysis, App. 33a-36a, and went on to frame and answer Moore's constitutional arguments as follows:

> The bottom line question in this case is whether the State has satisfied its constitutional obligations by establishing the Office of the Public Defender ("O.P.D."), making expert services available to clients of that Office, and requiring that, in order for an indigent to receive State-funded expert services, the defendant *must* seek representation by O.P.D. We conclude that the State has not deprived petitioner of any of his constitutional rights by requiring that he apply to the O.P.D. for representation before he is entitled as an indigent to State funded expert witness services.

App. 36a (emphasis in original).

The Court of Appeals noted that this Court "contemplated in *Ake* that States could place restrictions on indigent defendants' access to state-funded expert services." App. 36a. The Court of Appeals described its decision in *State v. Miller*, 337 Md. 71, 651 A.2d 845 (1994) as "instructive" on whether such a restriction was appropriate in Moore's case. App. 38a.

In *Miller*, the defendant had refused Public Defender representation and was being represented *pro bono*. 337 Md. at 74-75, 651 A.2d at 846. He objected on Sixth Amendment and equal protection grounds to the requirement in Maryland Rule 1-325(b) that a defendant can only obtain a free transcript on appeal after applying for and being denied Public Defender representation. 337 Md. at 76, 651 A.2d at

847. The Court of Appeals in that case found no equal protection violation because Miller had simply refused to comply with the reasonable regulations in Rule 1-325(b). 337 Md. at 85-86, 651 A.2d at 852. It also rejected the right to counsel claim, citing this Court's decision in *Wheat v. United States,* 486 U.S. 153 (1988) for the proposition that the Sixth Amendment right is not absolute. 337 Md. at 87-88, 651 A.2d at 853.

Applying *Miller* to the claims raised by Moore, the Court of Appeals concluded that:

> Our holding in *Miller* governs the outcome of the case *sub judice.* Although the Maryland Rules contain no analogue to Md. Rule 1-325(b) with respect to the appointment of experts, the practical effect of nonseverable O.P.D. services under Art. 27A is the same. Indigent defendants may utilize the O.P.D.'s complete "package" of services, or forgo them entirely. While such defendants may face difficult choices, the Constitution does not bar the State of Maryland from requiring them to choose between counsel of their choice and ancillary services provided by the O.P.D.

App. 41a.

Because *Miller* involved only equal protection and Sixth Amendment claims, that analysis left Moore's due process claim to be addressed. First, the Court of Appeals rejected the lower court's rationale that the State's expert alone satisfied Moore's rights. App. 42a-48a. Relying on *Ake* and its progeny, the Court of Appeals concluded that defendants are entitled to their own experts. "We reject the holding of the Court of Special Appeals . . . that Moore's *Ake* rights were satisfied by discovery and the opportunity to

cross-examine Dr. Cotton." App. 48a. But the court went on to conclude that "[t]he State satisfied the Due Process Clause, as interpreted in *Ake*, by making expert assistance available to Moore through the O.P.D., conditioned on representation by that agency." *Id.*

Chief Judge Bell's Dissent

In a lengthy dissenting opinion, Chief Judge Bell disagreed on multiple grounds with the majority's conclusion that Moore could be denied expert funding because he had private counsel. App. 50a-84a. Chief Judge Bell declared that the majority's approach "infringes on the indigent defendant's Sixth Amendment rights to counsel of choice." App. 82a. Chief Judge Bell noted that the majority extended the *Miller* rationale to "the broad spectrum of ancillary services, not heretofore addressed," despite the absence of a rule corresponding to Maryland Rule 1-325, and that the analogue was "at best, a stretch." App. 57a, 61a.

Chief Judge Bell also attacked the majority's interpretation of *Wheat*. While he acknowledged that an indigent defendant's right to choice of counsel is "significantly restricted," citing this Court's opinions in *Wheat* and in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), he concluded that Moore's "insistence on counsel of choice" in his circumstances "does not implicate any of the recognized qualifications on the right to choice" of counsel. App. 75a, 77a.

Chief Judge Bell further stated, "I disagree that legal representation and the ancillary services required for an adequate defense are non-severable. In this belief, I am far from alone." App. 65a. Chief Judge Bell cited judicial opinions from twelve other states, including *English v. Missildine*, 311 N.W.2d 292 (Iowa 1981), which he

described as "on point and instructive." App. 65a-74a. That opinion is one of the rulings giving rise to the interstate conflict discussed at greater length below.

Moore's Motion For Reconsideration

Moore filed a timely limited motion for reconsideration with the Maryland Court of Appeals. He raised again the argument, which had not been addressed in the court's December 14, 2005 opinion, that he never validly waived his right to expert assistance because he had not been informed that he could substitute O.P.D. representation for his private counsel and thus obtain the necessary resources. Despite the absence of any evidence that Moore even knew he had such a choice (much less waived it), by proceeding to trial with privately retained counsel, rather than with O.P.D. representation, Moore had effectively relinquished his constitutional right to the expert assistance described in *Ake*. Moore's actions, he argued, did not meet the "intentional relinquishment or abandonment of a known right or privilege" standard in *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938), or the "knowing, intelligent act" standard in *Brady v. United States*, 397 U.S. 742, 748 (1970).

The Court of Appeals denied the motion for reconsideration on February 3, 2006. App. 1b.

REASONS FOR GRANTING THE PETITION

I. Certiorari should be granted to resolve the evenly divided split among state courts of last resort on the important federal question of whether a state may deny expert assistance to an indigent criminal defendant with private retained counsel.

As a result of the decision below, state courts of last resort are now split three to three on the first question

presented by this Petition.[4] This division among the highest state courts is a compelling reason to grant certiorari, particularly when the case law on this issue has been developed far beyond these six jurisdictions and demonstrates that the question is both important and regularly recurring.

This question does not arise in federal courts, because the Criminal Justice Act makes clear that ancillary defense services are available to all indigent defendants, without regard to who represents them.[5] Not all state courts, however, have followed the Congressional lead. In decisions spanning more than two decades, state courts in twenty-six states have now considered whether an indigent criminal defendant with private counsel can be eligible for public funding of defense costs.[6] In sixteen of those states, the

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[4] *Compare English v. Missildine*, 311 N.W.2d 292 (Iowa 1981) (concluding right does exist); *Widdis v. State*, 968 P.2d 1165 (Nev. 1998) (same); *and State v. Frank*, 803 So.2d 1 (La. 2001) (same) *with Morton v. Commonwealth*, 817 S.W.2d 218 (Ky. 1991) (concluding right does not exist); *Chao v. State*, 780 A.2d 1060 (Del. 2001) (same); *and Moore v. State*, 390 Md. 343, 889 A.2d 325 (2005).

[5] 18 U.S.C. § 3006A(e)(1) authorizes "[c]ounsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation" to request such funds in an *ex parte* application.

[6] In addition to the instant case in Maryland, the opinions in other jurisdictions include *Dubose v. State*, 662 So.2d 1189, 1192 (Ala. 1995); *Jacobson v. Anderson*, 57 P.3d 733, 734 (Ariz. Ct. App. 2002); *Tran v. Superior Court*, 112 Cal. Rptr. 2d 506, 508 (Cal. Ct. App. 2002); *People v. Cardenas*, 62 P.3d 621, 622-23 (Colo. 2002); *Chao*, 780 A.2d 1060; *Cain v. State*, 758 So. 2d 1257, 1258-59 (Fla. Dist. Ct. App. 2000); *Arnold v. Higa*, 600 P.2d 1383, 1385 (Haw. 1979); *People v. Evans*, 648 N.E.2d 964, 968-69 (Ill. App. Ct. 1995); *Beauchamp v. State*, 788 N.E.2d 881, 890 (Ind. Ct. App. 2003); *English*, 311 N.W.2d at 294; *Morton*, 817 S.W.2d at 219-20; *State v. Frank*, 803 So.2d at 8; *People v. Arquette*, 507 N.W.2d 824, 826 (Mich. App. 1993); *State v. Pederson*, 600 N.W.2d 451, *(cont'd)*

decisions appear to be based largely or entirely on state law.[7] In the remaining ten jurisdictions, six state courts of last resort have considered this important federal question with evenly divided results. The remaining four states have considered this question at the intermediate appellate level; these opinions divide three to one in favor of the indigent criminal defendant's entitlement to defense costs even when

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454 (Minn. 1999); *State v. Huchting*, 927 S.W.2d 411 (Mo. Ct. App. 1996); *Widdis*, 968 P.2d at 1167; *In re Cannady*, 600 A.2d 459, 461 (N.J. 1991); *State v. Brown*, 87 P.3d 1073, 1075 (N.M.Ct. App. 2004); *People v. Ulloa*, 766 N.Y.S.2d 699, 700 (N.Y. App. Div. 2003); *State v. Boyd*, 418 S.E.2d 471, 475 (N.C. 1992); *State v. Pasqualone*, No. 97-A-0034, 1999 WL 262174, *4 (Ct. App. Mar. 31, 1999); *Spain v. Dist. Court*, 882 P.2d 79, 81 (Okla. Crim. App. 1994); *State v. Burns*, 4 P.3d 795, 801-02 (Utah 2000); *State v. Wool*, 648 A.2d 655, 660 (Vt. 1994); *State ex rel. Rojas v. Wilkes*, 455 S.E.2d 575, 578 (W. Va. 1995). In *Jacobson* and *Evans*, the courts ruled that indigent defendants with retained counsel were entitled to state-funded expert assistance, but the parties opposing the defendants' requests did not premise their objections on the defendants' counsel status.

[7] In all but one of these jurisdictions, courts have found that defendants with private counsel were entitled to state funded assistance. *Dubose v. State*, 662 So.2d at 1192; *Jacobson v. Anderson*, 57 P.3d at 734; *Cain v. State*, 758 So. 2d at 1258-59; *Arnold v. Higa*, 600 P.2d at 1385; *People v. Evans*, 648 N.E.2d at 968-69; *Beauchamp v. State*, 788 N.E.2d at 890; *People v. Arquette*, 507 N.W.2d at 826; *State v. Pederson*, 600 N.W.2d at 454; *In re Cannady*, 600 A.2d at 461; *State v. Boyd*, 418 S.E.2d at 475; *Spain v. Dist. Court*, 882 P.2d at 81; *State v. Pasqualone*, 1999 WL 262174 at *4; *State v. Burns*, 4 P.3d at 801-02; *State v. Wool*, 648 A.2d at 660; *State ex rel. Rojas v. Wilkes*, 455 S.E.2d at 578. Only one court reached the opposite conclusion. *People v. Cardenas*, 62 P.3d at 622-23. All of these cases involve requests for expert assistance except *Cardenas* (request for translator), *Arquette* (request for transcripts), *Pederson* (same), and *Spain* (same). If the decisions in all twenty-six jurisdictions are considered together, therefore, the Maryland Court of Appeals' decision in this case adopted the distinctly minority view.

represented by private retained counsel.[8] These divided state court rulings have created great uncertainty over the scope of a defendant's *Ake* rights, particularly as those rights interact with the qualified right to choice of counsel as discussed in *Wheat*.

1. Iowa: English v. Missildine

A state court of last resort first considered whether an indigent criminal defendant with private counsel has a federal constitutional right to public funding of expert assistance in *English v. Missildine*, 311 N.W.2d 292 (Iowa 1981). Eighteen-year-old Mark English was charged with theft. His mother paid $900 to retain private counsel for her son, but she could not afford deposition expenses or the services of an expert. The trial court denied Mark English's application for the necessary funds. On appeal, the State argued that English was required to accept court-appointed or assigned counsel representation to receive the requested funds. The Iowa Supreme Court rejected this argument, concluding that "authority for the services requested by plaintiff exists under his sixth amendment right to effective representation of counsel," and noting that "the Constitution does not limit this right to defendants represented by appointed or assigned counsel." 311 N.W. 2d at 293-94.

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[8] *Compare People v. Ulloa*, 766 N.Y.S.2d 699, 700 (N.Y. App. Div. 2003) (concluding right does exist); *Tran v. Superior Court*, 112 Cal. Rptr. 2d 506, 508 (Cal. Ct. App. 2002) (same); *and State v. Huchting*, 927 S.W.2d 411 (Mo. Ct. App. 2002) (same) *with State v. Brown*, 87 P.3d 1073 (Ct. App. N.M. 2004) (concluding right does not exist). *Ulloa* involves a request for transcripts.

2. Nevada: Widdis v. State

In *Widdis v. State*, 968 P.2d 1165 (Nevada 1998), defendant Troy Lewis was charged with aiding and abetting first degree murder. Lewis' father and grandmother retained attorney Dennis Widdis to represent him. After Lewis pled to a reduced charge, Widdis hired a psychologist to evaluate Lewis in support of his arguments for sentencing alternatives. Lewis' family could not afford to pay the expert's fee, and Widdis filed a motion seeking public payment of the psychologist's fee. When the motion was denied by the trial court, Widdis sought a writ of mandamus from the Nevada Supreme Court. In its opinion, that court discussed *English v. Missildine* at length, noting its Sixth Amendment rationale, and concluded "the *English* court's analytical framework is sound." 968 P.2d at 1168. "[T]he State has a duty," the court declared, "to provide reasonable and necessary defense services at public expense to indigent criminal defendants who have nonetheless retained private counsel." *Id.* at 1167.

3. Louisiana: State v. Frank, State v. Touchet, and State v. Jones

In *State v. Frank*, 803 So.2d 1 (La. 2001), defendant Antoinette Frank was charged with capital murder. She and her mother collected funds, in part from the sale of defendant's furniture, to pay private defense counsel. Frank petitioned the trial court for state funds for expert services. 803 So.2d at 6. The trial court declared the defendant not indigent, but the Supreme Court of Louisiana found this conclusion to be an abuse of discretion. *Id.* at 8. The court concluded that Frank should have been entitled to make a factual showing that she needed expert assistance to present mitigating evidence. The court in *Frank* relied on its earlier decision in *State v. Touchet*, 642 So.2d 1213 (La. 1994), which was based on federal constitutional principles. The

court in *Touchet* cited this Court's opinions in *Ake v. Oklahoma* and *Britt v. North Carolina*, 404 U.S. 226 (1971), for the principle that indigent defendants have a due process right to expert assistance.

In *State v. Jones*, 707 So. 2d 975 (La. 1998), the Supreme Court of Louisiana addressed a parallel question in the context of a defendant's request for additional counsel. Ulysses Jones was charged with capital murder and two public defenders were appointed to represent him. When Jones' father retained private counsel for his son, one public defender withdrew and the second was removed by the trial court. 707 So. 2d at 976. Arguing that two lawyers are preferable in a capital case, Jones' counsel asked the court to declare Jones indigent and reappoint the second public defender. *Id.* The trial court found that Jones was indigent, removed private counsel from the case and reappointed the public defender, "reasoning that if a defendant is indigent, he must be represented by [the public defender's office]." *Id.* Jones appealed.

Reversing the trial court, the Supreme Court of Louisiana reasoned that a defendant loses neither his indigent status, nor his concomitant eligibility for state-funded services, by proceeding to trial without the public defender. The court first noted that the state constitution and Sixth Amendment guarantee a criminal defendant not only the right to effective assistance of counsel, but also the qualified "right to select and be represented by counsel of choice," so long as he can "obtain and afford" it. *Id.* at 976-77. The court then found that an indigent defendant with collaterally-funded private counsel "may still be entitled to state funding for auxiliary services provided he can meet the requirements of *Touchet*." *Id.* at 977-78. The court further suggested that, even where a defendant "retains counsel at his own expense [and] has not derived that benefit from a

collateral source," he might be indigent for purposes of obtaining State-funded auxiliary services. *Id.* at 978.

4. Kentucky: Morton v. Commonwealth

The first state court of last resort to disagree with the reasoning in *English v. Missildine* and in the other cases discussed above was the Kentucky Supreme Court in *Morton v. Commonwealth,* 817 S.W.2d 218 (1991). Defendant Barrington Morton was charged with capital murder and hired an attorney for $100. 817 S.W.2d at 219-20. His counsel then asked that Morton be declared indigent, and sought public funds for expert witnesses and scientific tests. *Id.* at 219. The trial court refused to grant these requests unless Morton discharged his attorney and used a public defender. Morton did so, and his defense was publicly funded. *Id.* at 220.

After a trial and conviction, Morton appealed, arguing that forcing him to make this choice violated his constitutional right to counsel. *Id.* The Kentucky Supreme Court disagreed, declaring that Morton had decided that receiving auxiliary services "outweighed his desire to be represented by a particular attorney. Having made such a determination and having otherwise been afforded his Sixth Amendment . . . rights." The court held that requiring the defendant to make such a choice did not violate any constitutional provision. *Id.*[9] The court acknowledged that

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[9] Despite the *de minimis* nature of the counsel fee paid by Morton, the Kentucky Supreme Court appears to have drawn a line between defendants represented by purely *pro bono* counsel and those represented by counsel who have been paid a fee, however minimal. In *Kenton-Gallatin-Boone Public Defender v. Stephens*, 819 S.W.2d 37 (Ky. 1991), issued less than three months after *Morton*, the court upheld a trial court order directing the payment of expert fees to defendants with *pro bono* counsel, stating that such funding "is their constitutional right," even *(cont'd)*

the Iowa Supreme Court in *English v. Missildine* had commented that making such fees available to defendants with private counsel would relieve burdens on the public defender, but the Kentucky court disagreed with this rationale and stated that making expert fees available in Morton's case would lead to "abusive utilization." *Id.* at 221.

5. Delaware: Thompson and Chao

In *Office of the Public Defender v. Thompson*, 451 A.2d 835 (Del. 1982), the Supreme Court of Delaware declared that when indigent defendants with private counsel asked for public funds for experts, the request would be deemed to be an application by the private counsel to withdraw and a motion for public defender representation. Later, in another case, an indigent defendant with private counsel objected to the *Thompson* scheme, alleging that she had due process, right to counsel, and equal protection rights to public funding of expert assistance. *Chao v. State*, 780 A.2d at 1068 (Del. 2001).

The Court in *Chao* rejected all three constitutional claims. Although it disposed of the due process claim on the factual grounds that expert assistance would have "only marginally" improved Chao's defense, 708 A.2d at 1070, the court addressed the Sixth Amendment and Equal Protection claims squarely in the context of the defendant's retained counsel status. The right to counsel claim was without merit, the court held, because "the *Thompson* guidelines . . . do not preclude the provision of public funds to indigent defendants." *Id.* at 1070-71. Although defendants would

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(cont'd from previous page)
though the defendants were not represented by the state Public Defender. 819 S.W.2d at 38.

have to give up their private counsel to obtain access to public funding for experts, the court ruled that "the Sixth Amendment guarantees only an effective advocate for defendants in criminal cases and does not require that defendants be represented by their lawyer of choice." *Id.* at 1071. The equal protection claim failed similarly, the court held, because the distinction in treatment based on a defendant's counsel status was rationally related to the legitimate governmental purpose of "preserv[ing] the State's ability to assign budgetary responsibility" over expert fees. *Id.*

6. Maryland: Moore v. State

The starkly divided majority and dissenting opinions issued by the Maryland Court of Appeals below echo the division in the other state courts of last resort that have considered this important federal question. As discussed above, the majority below concluded that Moore had not been deprived of any of his constitutional rights, in large part based on its reliance on *Miller*. Acknowledging that "a State might provide funds enabling indigent defendants with retained counsel to hire experts of their own choosing," the court nevertheless concluded that "*Ake* does not require this approach." App. 37a.

Dissenting, Chief Judge Bell disagreed with this reasoning and concluded that the majority's approach "infringes on the indigent defendant's Sixth Amendment rights to counsel of choice." App. 82a. The majority's *Miller* analysis "stated that defendants properly may be put to the choice of counsel and the ancillary services required to be supplied at State expense to ensure an effective defense, because the constitution does not bar the State of Maryland from doing so. I do not agree." App. 74a.

7. Summary

The six opinions discussed above reveal a deep schism between two groups of state courts of last resort on the constitutional question of whether indigent criminal defendants are entitled to public funding for expert assistance when they are not represented by the state Public Defender. This division, by itself, provides sufficient grounds for granting certiorari. Moreover, decisions by intermediate courts in four other states compound the scope of the disagreement.[10] It is important and appropriate to grant certiorari in this case in order to bring certainty and uniformity throughout the state courts to indigent criminal defendants' fundamental due process, equal protection, and counsel rights.

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[10] *See supra* note 8. The opinions in the intermediate courts apply the same rationales used by the courts of last resort. For example, in *Tran*, the California Court of Appeal noted that "[a] test based on the status of defense counsel would be constitutionally infirm," and ruled that the trial court's decision to deny funding to the defendant "impinged on his right to counsel of his choice." 112 Cal. Rptr.2d at 509, 511 (quotation omitted). In *Huchting*, the Missouri Court of Appeals agreed with cases declaring that a defendant "who spends down his resources in the middle of his defense or who relies on the largesse of friends and family for initial defense expenses is no less entitled to due process and fundamental fairness than is a defendant who enters the judicial system penniless." 927 S.W.2d at 419. In *Brown*, where the Court of Appeals of New Mexico reached the opposite conclusion, the majority cited this Court's opinion in *Wheat* and held "that the right to counsel of choice is not an unqualified right and therefore it must yield to other important values," such as legislative efforts to control finances by confining expert funding to public defender clients. 87 P.3d at 1078. The dissent in *Brown* disagreed on statutory, public policy, and constitutional grounds, stating that requiring a defendant to choose between counsel of his choice and a state-funded expert "is an unconstitutional result." *Id.* at 1082.

Furthermore, the decision below reaches the wrong result: by forcing future defendants to choose between retained counsel and state-funded expert assistance, the Court of Appeals has improperly circumscribed both the right to expert assistance enunciated in *Ake* and the qualified right to choice of counsel as described in *Wheat.*[11] The practical consequences of this issue are of great significance to indigent criminal defendants: as the volume of state court cases shows, it is not uncommon for such defendants to have private counsel and also seek public funds for expert assistance. In the normal course, a defendant will have chosen counsel before he fully understands the State's case against him and before he can appreciate, assert, and substantiate the need for an expert. That sequence of events ensures that many defendants will find themselves in the same position as the Petitioner, forced to choose between one constitutional right and the other, if the decision below were to be upheld.

II. Certiorari Should Be Granted To Address The Important Federal Question Of What Constitutes A Valid Waiver Of The Right To Expert Assistance Under *Ake*, Particularly If The First Question Presented By This Petition Is Resolved In The Negative.

The choice between constitutional rights that defendants in Moore's position will face under the decision

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[11] Because the Court of Appeals found that the Maryland statute was "silent" on the question presented by this case, the constitutionality of that statute is relevant only to the extent the decision below is viewed as reading unconstitutional restrictions into Article 27A. Petitioner's claim can be resolved by concluding that the statute permits, and the Constitution requires, that he be granted the requested funding while proceeding with retained counsel.

below gives rise to the second question presented herein. *Ake* makes clear, and the Maryland Court of Appeals agreed, that indigent defendants have the right to publicly funded assistance via some mechanism. When Moore proceeded to trial with his private counsel and without an expert, the Maryland Court of Appeals held that he effectively relinquished that right. Moore did not knowingly relinquish any rights, however, and any waiver that did occur was invalid.

As this Court has noted, "[t]here is a presumption against the waiver of constitutional rights," *Brookhart v. Janis*, 384 U.S. 1, 4 (1966), and "any alleged waiver" of the guarantees afforded a criminal defendant at trial "must meet the strict standard of an intentional relinquishment of a 'known' right." *Schneckloth v. Bustamonte*, 412 U.S. 218, 238 (1973). *See also Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.") How to apply this waiver standard in the context of Moore's situation presents an important federal question going to the heart of the effectiveness of this Court's decision in *Ake*. *Accord United States v. Olano*, 507 U.S. 725, 733 (1993) ("Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake.").

The waiver question must be resolved if the first question presented by this Petition is answered in the negative. If the law effectively requires defendants to choose between private retained counsel and no state-funded expert on the one hand, and a Public Defender and state-funded experts on the other hand, it is important to ensure

that a defendant (i) understands the choice is available and (ii) appreciates the consequences of making such a choice.

By contrast, for example, to *Morton* and *Thompson*, where the defendants in those cases were explicitly presented with the option of choosing between the two alternatives, there is nothing in the record to indicate that Moore was ever informed that he had the choice to change counsel and obtain the expert assistance he needed. The record from the trial court includes no comments from Moore, and no statements from the trial court or any other party, that even remotely suggest Moore was informed he had an option or of the calculus he faced. Alone among defendants facing this issue, Moore was forced to go to trial without expert assistance and without being advised of his right to replace his private counsel with a court-appointed lawyer who would come armed with the necessary expert assistance critical to his defense.

The Court should grant this Petition in order to provide guidance regarding the important federal question of what constitutes a valid waiver of a defendant's constitutional rights in these circumstances. In particular, the decision below, which refused to acknowledge the invalidity of the waiver even in the complete absence of facts suggesting Moore was aware of and understood his options, must be reversed.

CONCLUSION

The decision below leaves state courts of last resort evenly split on the question of whether an indigent criminal defendant may be required to accept Public Defender representation in order to receive state funds for an expert. This issue is an important federal question: it affects the scope of indigent criminal defendants' fundamental constitutional rights under *Ake* and under *Wheat*. Granting the Petition would present the opportunity to settle this question and to resolve the conflict among the state courts in a way that protects both important sets of rights.

The decision below, particularly if upheld on the first question presented, also implicates the important federal question of what constitutes a valid waiver of a defendant's rights in Petitioner's circumstance. Granting the Petition would allow the Court to clarify this important standard.

For the foregoing reasons, the Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,

W. BRADLEY NEY
1200 New Hampshire Ave., N.W.
Washington, DC 20036
(202) 776-2280

ALBERT H. TURKUS
Counsel of Record
KENNETH W. GIDEON
JULIA M. KAZAKS
DONALD P. SALZMAN
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7000

Attorneys for Petitioner Frederick James Moore

May 4, 2006

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APPENDIX A

Court of Appeals of Maryland.
Frederick James MOORE
v.
STATE of Maryland.
No. 28, Sept. Term, 2004.

Dec. 14, 2005.
Reconsideration Denied Feb. 3, 2006.

Argued before BELL, C.J., RAKER, WILNER, CATHELL, HARRELL, BATTAGLIA and GREENE, JJ.

RAKER, Judge.

Petitioner, Frederick James Moore, was convicted by a jury in the Circuit Court for Howard County of first degree murder of Ashley Nicole Mason. Prior to trial, the State conducted DNA analysis on evidence found at the scene of the crime, and petitioner, who was represented by private counsel but for purposes of the motion was conceded to be indigent, requested state-funded expert assistance in the field of DNA analysis to prepare his defense. The trial court denied petitioner's motion on the grounds that the Office of the Public Defender was not required to pay for an expert when a defendant is represented by private counsel, and that the trial court had no funds to pay for an expert. The Court of Special Appeals affirmed. *Moore v. State,* 154 Md.App. 578, 841 A.2d 31 (2004). We granted Moore's petition for a writ of certiorari, to consider the following questions:

> I. Is a criminal defendant who is unable to afford the assistance of a DNA expert, but who has retained private counsel using his

> limited personal funds, entitled to public funding for expert assistance under Article 27A of the Maryland Code where the most extensive testimony offered against the defendant at trial was that of the State's DNA expert?
>
> II. Is a criminal defendant who is unable to afford the assistance of a DNA expert, but who has retained private counsel using his limited personal funds, entitled to public funding for expert assistance under the United States and Maryland Constitutions where the most extensive testimony offered against the defendant at trial was that of the State's DNA expert?
>
> III. Did the ruling below improperly limit this Court's decision in *Sessoms v. State*, 357 Md. 274, 744 A.2d 9 (2000), by denying [petitioner] the opportunity to introduce evidence relating to the past violent acts of a separately tried co-defendant, where [petitioner's] trial centered on the relative roles of [petitioner] and that co-defendant and [petitioner]'s theory of the case was that the co-defendant committed the murder alone?

Moore v. State, 381 Md. 674, 851 A.2d 593 (2004). We granted the State's conditional cross-petition, containing the following questions:

> I. Assuming *arguendo* that a defendant who has paid for a private attorney using his own funds could, under some circumstances, be considered "indigent" for constitutional or statutory purposes, did Moore fail to establish:

(1) his indigence in this case, or (2) that a substantial question existed requiring the testimony of a defense DNA expert or that his defense could not be developed without such testimony?

II. Even assuming *arguendo* that the trial court erred in declining to order either the Office of the Public Defender or the Circuit Court for Howard County to provide funds to obtain the testimony of Moore's DNA expert, was such error harmless beyond a reasonable doubt where the DNA evidence was essentially cumulative to evidence from other sources and where there was overwhelming non-DNA evidence establishing Moore's guilt?

III. Is Moore's complaint regarding the exclusion of evidence unpreserved for appellate review where there was no proffer regarding the contents of the evidence and where one of the witnesses Moore wished to cross-examine about alleged prior assaults by his co-defendant answered "no" when asked if the co-defendant had assaulted her?

I. Facts

On the morning of November 3, 2000, a delivery driver discovered a pool of blood in the parking lot of a Howard County restaurant. Following a bloody trail into the woods, he discovered the lifeless body of fourteen-year-old Ashley Nicole Mason. The medical examiner later determined the cause of Mason's death to have been multiple stab wounds and strangulation.

Petitioner and Scott Jory Brill were indicted by the Grand Jury for Howard County for the murder.[1] Pursuant to Md.Code (1974, 1998 Repl.Vol., 2000 Cum.Supp.), §§ 10-915(c) of the Courts and Judicial Proceedings Article,[2] the

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[1] Brill and Moore were tried separately and each was convicted of the murder of Ashley Mason.

[2] Section 10-915(c) of the Courts and Judicial Proceedings Article provides as follows:

> "In any criminal proceeding, the evidence of a DNA profile is admissible to prove or disprove the identity of any person, if the party seeking to introduce the evidence of a DNA profile:
>
> (1) Notifies in writing the other party or parties by mail at least 45 days before any criminal proceeding; and
>
> (2) Provides, if applicable and requested in writing, the other party or parties at least 30 days before any criminal proceeding with:
>
> (i) First generation film copy or suitable reproductions of autoradiographs, dot blots, slot blots, silver stained gels, test strips, control strips, and any other results generated in the course of the analysis;
>
> (ii) Copies of laboratory notes generated in connection with the analysis, including chain of custody documents, sizing and hybridization information, statistical calculations, and worksheets;
>
> (iii) Laboratory protocols and procedures utilized in the analysis;
>
> (iv) The identification of each genetic locus analyzed; and
>
> (v) A statement setting forth the genotype data and the profile frequencies for the databases utilized."

State served Moore with a timely Notice of Intention to Introduce DNA Evidence. The State provided Moore with documents produced by Cellmark Diagnostics, Inc. ("Cellmark"), detailing results obtained by Cellmark in its laboratory analysis of evidence recovered from the crime scene.

Moore filed a motion captioned "Defendant's Motion To Have the Circuit Court for Howard County or the Office of the Public Defender Provide Financial Aid to the Defendant for the Purpose of Providing a DNA Expert to Testify for the Defendant" (Funding Motion). In addition to asserting Moore's inability to pay for the services of a DNA expert,[3] the Funding Motion contained the following statements:

> "1. That the defendant is charged with a very serious offense of murder in the first degree.
>
> 2. That at no time did the defendant, Frederick Moore, give a statement implicating himself in the offense.
>
> * * *
>
> 5. That ... defendant's mother, Anita Moore, was able to scrape together $1000.00, said funds which were paid to J. Thomas McClintock, Ph.D., a microbiologist and molecular biologist as well as an expert in the field of DNA testing.

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[3] The record indicates that Moore retained counsel using funds he received in a personal injury settlement contemporaneous to his arrest for the instant offense. He asserted that he was currently "without a job or funds to pay for the services of a DNA expert" due to his incarceration pending trial.

6. That counsel for defendant sent to Dr. McClintock all of the materials sent to counsel by the Office of the State's Attorney for Dr. McClintock to review.

7. That after his review of the materials, Dr. McClintock provided defendant's counsel with a preliminary opinion regarding the DNA testing used in the case against Frederick Moore.

* * *

10. That the defendant believes he would be seriously prejudiced if the Court were to deny his request.

11. That the defendant believes that, BUT FOR THE FACT THAT HE IS POOR AND COMES FROM A POOR FAMILY, he would be able to hire the DNA expert which the defendant and his counsel believe would be extremely important to help explain to the jury that there are two sides to every DNA test result.

12. That the defendant believes that it is prejudicial to him if he is denied the right to have an expert witness testify on his behalf while the State is allowed to have an expert witness even though counsel for the State is not required to pay for the services of the DNA expert.

13. That counsel for defendant filed with the Honorable Court a Motion to Suppress DNA evidence and as part of the memorandum in

> support of his motion, counsel for defendant listed a number of areas in which mistakes can be made by the State's expert. That unless counsel for the defendant is allowed to have an expert to support the defendant's contention, the defendant will be unjustly prejudiced."

In the Suppression Motion to which Moore refers in paragraph 13 of the Funding Motion, Moore stated, in pertinent part:

> "9. According to the FBI standards, which have not been established as proof beyond a reasonable doubt to show guilt, nine of thirteen loci are necessary to establish proof, although again NOT BEYOND A REASONABLE DOUBT, to show that the DNA recovered at a scene of a crime is associated to a particular GROUP of individuals rather than a specific individual. In fact, when providing results, so called experts of DNA testing will state, among other things, that a person CAN NOT BE EXCLUDED as the person providing the DNA. At no time can the DNA expert state conclusively that DNA evidence can be linked conclusively to any particular person or that a particular person was present at the scene of the crime.
>
> 10. That according to the results of the DNA testing, either Scott Brill or Frederick Moore could be included as the provider of the DNA found at the scene of the crime but the results do not state conclusively that Frederick Moore was present at the scene of the crime

> or that the DNA was conclusively the DNA of Frederick Moore."

The Circuit Court denied the Suppression Motion.

At a hearing on the Funding Motion, Moore's counsel again represented to the Circuit Court that Moore could not afford a DNA expert. With respect to Dr. McClintock, counsel stated:

> "Dr. McClintock has, in fact, worked with me on this case to a degree. We were able to come up with some funds, initially, to get the doctor to help me with some preparation. His fee is $225.00 per hour, with a minimum of four hours and a maximum of ten hours. I don't anticipate there being ten hours of work here, so I would imagine somewhere between the four and the ten at a cost of $225.00 per hour."

Regarding the usefulness or necessity of a DNA expert's services in Moore's case, Moore represented as follows:

> "[W]e got into all of the DNA testimony and evidence, rather, and it became quite obvious that Mr. Moore would be prejudiced if he were not allowed to have an expert as the State was allowed to have an expert.
>
> * * *
>
> I do feel it's a prejudice to anyone who comes before the Court on a serious matter where experts are necessary.... It's just impossible for anyone to properly defend a case unless

> they have thousands and thousands of dollars just to pay experts."

The District Public Defender for Carroll and Howard Counties appeared at the hearing by the consent of both parties. She informed the court that it was the Public Defender's policy not to provide funds for experts in "private counsel cases," that she had spoken to her superiors, the Public Defender and Deputy Public Defender, about Moore's case, and that these officials had been unwilling to make an exception to the policy. The State indicated, both in its written response to the Funding Motion and orally at the hearing, that it took no position as to Moore's request.

Following a brief recess, the court made the following oral ruling:

> "I just confirmed with Judge Leasure, the administrative Judge, that-with reference to the availability of Court funds and she confirms or advises me that there are no Court funds dedicated or available to provide in general for experts in cases where an individual will have private counsel and, specifically, there are not funds available-Court funds available to provide for the expert in this case. I am mindful of the Appellate Courts of the Fourth Circuit opinion in the *Miller* case [*Miller v. Smith*, 115 F.3d 1136 (4th Cir. 1997), *cert. denied sub nom Miller v. Corcoran*, 522 U.S. 884, 118 S.Ct. 213, 139 L.Ed.2d 148 (1997)] that, as I understand it, suggests that there is a vehicle afforded in the State of Maryland to provide counsel and the costs incurred and appeals and, as [the District Public Defender] said, the issue in the

> *Miller* case was the cost of a transcript but, I think, by analogy, it would apply to a case where a Defendant who has private counsel, seeks funds to utilize for an expert in this case. I'll not, since, as I understand it, [defense counsel] is privately retained-You haven't been referred as-this case by the Public Defender and this is not a Panel case if I can use that term and that may not be the correct term-you're privately engaged in this case.... And I would not direct the Office of the Public Defender to provide fees in this case since they are not counsel of record in the case. So, I'll specifically deny your request."

Moore did not testify at the trial. His defense, conveyed to the jury by way of argument of counsel, was that although Moore was present at the scene of the crime, Scott Brill had acted alone in killing Mason, while Moore stood by, fearing for his own life. In his opening statement to the jury, defense counsel stated as follows:

> "Was Frederick Moore at the scene when Ashley Mason was killed? Yes. He was. And Frederick Moore saw what Scott Brill did.... Frederick Moore was scared to death. Frederick Moore thought he might be next because there was no logic to what Scott Brill did."

The State presented testimony that evidence had been collected at or near the crime scene. These items included blood recovered from the restaurant parking lot, Mason's underwear, two "do-rags" (head coverings) recovered from bushes near Mason's body, a bloody knife discovered by a garbage collector near the restaurant, clippings from Mason's

fingernails, and swabs taken from Mason's ankles, vagina, and anus.

The State called Dr. Robin Cotton, forensic lab director for Cellmark. Dr. Cotton first explained the basis and methodology for conducting forensic DNA analysis using the polymerase chain reaction (PCR) method of amplification and short tandem repeats (STR) as genetic markers.[4]

Dr. Cotton next testified to the results of Cellmark's analysis of the evidence in the instant case. DNA on each of the "do-rags" was consistent with Frederick Moore's at each of the nine loci tested. Within Moore's racial category, only one individual in 79 billion could be expected to exhibit that particular DNA profile. DNA obtained from the inside of the knife was consistent with that of Ashley Mason; DNA obtained from the outside of the knife came from multiple sources. Moore was identified as a possible contributor at six of the nine loci; the outside of the knife was inconclusive as to Brill. The fingernail clippings from Ashley Mason's right and left hands both revealed a mixture of DNA, with Ashley Mason identified as the primary source. There were also indications of a male as a possible source, but no further conclusion could be made. Swabs from Mason's left ankle showed a mixture of DNA, with no primary source. Brill was included as a possible source, while Moore was excluded as a source. Swabs from Mason's right ankle also revealed a mixture of DNA, with Mason herself as the primary source. The secondary DNA was inconclusive as to Moore and as to Brill, with both men included at four of the nine loci. The vaginal swabs yielded both sperm fractions

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[4] We reviewed this methodology at some length in *Young v. State*, 388 Md. 99, 106-112, 879 A.2d 44, 48-52 (2005).

and non-sperm fractions. The sperm fractions indicated the presence of male DNA, but no further conclusions could be drawn. Sperm fractions recovered from the anal swabs revealed that Moore could be included as a possible source at five of the nine loci; no conclusion could be reached on the remaining four loci.[5] A comparison with Scott Brill's DNA was inconclusive. Sperm fractions recovered from Mason's underwear revealed a mixture of at least two sources. Although no primary source was determined, Frederick Moore was included as a possible contributor at all nine loci. Within Moore's racial category, approximately one individual in 40,000 could have contributed these sperm fractions.

In addition to the DNA evidence, the State presented testimony from an acquaintance of Moore and Brill, Martise Stewart, from Scott Brill's sister, Crystal Brill, and from Moore's cousin and the mother of Brill's child, Danielle Ritter. According to Stewart, Ashley Mason arrived at Stewart's home in the company of Moore and Brill. An altercation broke out, first between Mason and Brill, then between Mason and both men. Stewart observed Brill punch Mason in the face, and then Moore remarked "[j]ust go ahead and hit the bitch, man. Hit her." Stewart went upstairs after this exchange, but heard "a lot of loud commotion" continue in the basement. Stewart later saw Mason leave with Moore and Brill. At this time, Moore was wearing a do-rag.

Some hours later, Moore and Brill returned to Stewart's house. Moore's "butter Timberland" boots were "like smudged with blood," and blood was smeared on the front of Moore's pants legs. His do-rag was missing. Stewart did not

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[5] Moore was not charged with any sexual offense.

see any blood on Brill, but Brill had lacerations on both arms, "like he was in some kind of like tussle or something." Brill "indicated they killed her," and said that Mason had caused his lacerations by scratching him as he choked her. Moore "said they both had killed her and they put her behind the Pizza Hut on 108, or somewhere."[6] Moore also said that they had used a buck knife and that "he threw the knife and he couldn't find it." Moore told Stewart that "it was almost like daylight outside, but he said he would've definitely recovered the weapon, but he couldn't, like, find where he threw it at."

Crystal Brill identified photographs of the knife found by the garbage collector as those of a knife she had bought for Moore at a flea market, and that she knew Moore to carry it in his pocket. Crystal Brill also identified the two do-rags found near Ashley's body as belonging to Moore, explaining that Moore wore two do-rags simultaneously because one had a "little rip." She recognized the same rip when the do-rags were shown to her in court. Crystal Brill testified that Moore wore butter-colored Timberland boots prior to the murder, but that she never saw him wear these boots after Ashley was killed. In addition, Crystal Brill testified that after the killing, she saw Moore wiping down the inside of the passenger door on Scott Brill's Ford Escort with a rag. Using a photo, Crystal pointed out the area that Moore had wiped down, which included the window handle. She had never before seen Moore wipe down the car in that fashion.

Danielle Ritter testified that some weeks after the murder, Moore had told her "what had happened." On direct

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[6] On cross-examination, Stewart acknowledged that in his grand jury testimony he had "probably" recounted only Brill confessing to the murder. But Stewart nonetheless maintained that both men had in fact confessed.

examination, Ritter at first testified that Moore had told her Ashley "got killed" in a parking lot, but "didn't really say" who had killed her. After some prodding by the State, Ritter testified that Moore had said "we" killed her. On cross-examination, however, defense counsel asked Ritter "Freddy Moore never told you he stabbed Ashley, did he," and Ritter answered, "He don't say who stabbed her."

Petitioner was convicted of first degree murder and was sentenced to incarceration for his natural life. He noted a timely appeal to the Court of Special Appeals, which affirmed his conviction. *Moore v. State,* 154 Md.App. 578, 841 A.2d 31 (2004). Before that court, he argued, *inter alia,* that the trial court erred in denying his motion requesting funding for a DNA defense expert on the grounds of indigency when he had retained and financed private counsel. He argued that the trial court (and the Public Defender) violated his federal Constitutional rights to due process, equal protection of law, and effective assistance of counsel, as well as Maryland's statutory framework providing legal aid to indigents.

The State argued that any statutory or Constitutional right to State funding for expert testimony was dependent upon indigency and that because Moore had retained private counsel, he could not be deemed indigent for any purpose. In addition, the State argued that Moore had failed to make the necessary showing in the trial court that he was indigent. The intermediate appellate court held that Moore was not indigent and was not entitled to State funding for the expert. The court stated as follows:

> "[Petitioner] paid to be represented by private counsel and did not seek representation through the public defender. Therefore, [petitioner] is not indigent and is foreclosed

> from requesting public funding for a DNA expert, either through the Public Defender's Office or the lower court. That is not to say that a defendant who proceeds with private counsel cannot later become indigent, apply for representation with the Public Defender, and avail himself or herself of the benefits of other necessary services such as an expert witness. We hold only that a defendant who pays for and retains private counsel throughout the adjudicatory process cannot be deemed indigent for purposes of obtaining a publically funded expert witness."

Id. at 592, 841 A.2d at 39.

The Court of Special Appeals also rejected Moore's constitutional arguments and concluded that the State had complied fully with the requirements of *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). The court reasoned that the evaluation of the samples giving rise to the DNA testimony in this case were "impartial, scientific and objective." *Moore,* 154 Md.App. at 598, 841 A.2d at 42. The court concluded that "the State provided expert analysis and any constitutional duty had ended after that point." *Id.*

II.

Moore argues before this Court that the federal Constitutional guarantees of effective assistance of counsel, due process of law, and equal protection of law include the right to a defense expert under the circumstances presented herein, without regard to whether an indigent defendant has private counsel. Relying on *Ake,* he argues that he is entitled to the "basic tools of an adequate defense" and that where, as

here, DNA evidence is likely to be a significant factor, he should have been afforded expert assistance. He argues that the Court of Special Appeals was wrong in concluding that Dr. Cotton, the Cellmark expert, satisfied the State's Constitutional obligations. He asserts the Dr. Cotton did not assist with Moore's trial preparation of cross-examination and that Moore was at a distinct disadvantage and without an opportunity to prepare a defense in a case in which DNA was central to the prosecution's case. Moore also argues that the trial court and intermediate appellate court erred in holding that Moore was not entitled to expert assistance because he had private counsel. He maintains that he made the requisite showing under *Ake* that the issue of DNA would be a significant factor at trial and that he was prejudiced by the denial of these funds to secure an expert. Finally, Moore argues that he is entitled to expert funding at State expense pursuant to Md.Code (1957, 2003 Repl.Vol., 2004 Cum.Supp.), Art. 27A (governing the duties of the Public Defender).[7] He maintains that public funding of expert costs is available to indigent defendants in Maryland without regard to a defendant's relationship with counsel or upon accepting legal representation by the Public Defender.

The State contends initially that Moore bore the burden of establishing indigency but failed to do so. Assuming *arguendo* that Moore was indigent, the State argues that *Ake* is distinguishable from the instant case and does not compel the remedy sought by Moore. It further contends that any Constitutional right to the assistance of a DNA expert was satisfied by the State's disclosure to Moore of the Cellmark documents and reports during discovery.

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[7] Unless otherwise noted, all subsequent statutory references herein shall be to Md.Code (1957, 2003 Repl.Vol., 2004 Cum.Supp.) Art. 27A.

Even assuming that *Ake* could require the appointment of a State-funded DNA expert to an indigent defendant, the State argues that a defendant must establish that a substantial question exists requiring the testimony of a DNA expert or that the defense cannot be developed without expert assistance. It argues that Moore made only general allegations that a defense expert could potentially point out mistakes made by a government expert.

With respect to Moore's argument that he is entitled to funding under Art. 27A, the State contends that the statutory framework does not require the Public Defender to provide expert witness funding to a defendant represented by private counsel. Rather, the State argues, indigent defendants are obliged to seek legal representation by the Public Defender before they are entitled to ancillary services provided through the budget of the Office of the Public Defender (O.P.D.). Finally, the State contends that if there were any error in denying Moore's funding request, it was harmless.

III.

A. *Ake v. Oklahoma*

In *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), the Supreme Court reversed the conviction and death sentence of an indigent defendant after the trial court denied his request for a state-funded psychiatric examination. The issue in *Ake* was "whether the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition,

when his sanity at the time of the offense is seriously in question." *Id.* at 70, 105 S.Ct. at 1089.

Ake was an indigent defendant, charged with first degree murder and shooting with the intent to kill. Before trial, his counsel represented to the court that Ake intended to present an insanity defense. He asked the court to arrange for a psychiatrist to examine the defendant with respect to his mental condition at the time of the offense, or to provide him with funds to enable the defense to arrange for such an examination. The court denied this request. Consequently, Ake had no access to a psychiatrist. Based on Ake's bizarre behavior in the courtroom pre-trial, Ake was examined by State psychiatrists to assess his competency to stand trial. The court found Ake to be a "mentally ill person in need of care and treatment," incompetent to stand trial, and ordered him committed to the State mental hospital. Six weeks later he was found to be competent and ordered to stand trial. Although Ake had undergone extensive court-ordered psychiatric examination with regard to his competency to stand trial, he had never been examined by a psychiatrist with respect to his mental condition at the time of the killings. Ake had entered a plea of not guilty by reason of insanity; his sole defense was lack of criminal responsibility, a defense which, because of indigency, he was obliged to present without the aid of a psychiatric expert. At trial, there was no expert testimony for either side as to Ake's sanity at the time of the offense. *Id.* at 72, 105 S.Ct. at 1091. Although Ake's counsel called to the stand and questioned the State psychiatrists who had examined Ake prior to trial, none could testify as to Ake's mental state at the time of the offense, because none had examined him on that point. *Id.* The jury rejected Ake's insanity defense and found him guilty on all counts. *Id.* at 73, 105 S.Ct. at 1091.

The Supreme Court explained as follows:

> "This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake."

Id. at 76, 105 S.Ct. at 1092.

"In recognition of this right," the Court stated, it had reached a series of decisions entitling indigents to various services at state expense. *See Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (effective assistance of counsel); *Little v. Streater,* 452 U.S. 1, 101 S.Ct. 2202, 68 L.Ed.2d 627 (1981) (blood grouping tests in "quasi-criminal" paternity proceedings); *Douglas v. California,* 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) (assistance of counsel on first direct appeal as of right); *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (assistance of counsel at trial); *Burns v. Ohio,* 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed.2d 1209 (1959) (waiver of Notice of Appeal filing fee); *Griffin v. Illinois,* 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956) (trial transcripts on appeal).

The Court further stated:

> "Meaningful access to justice has been the consistent theme of these cases. We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. Thus, while the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, it has often reaffirmed that fundamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims fairly within the adversary system.' To implement this principle, we have focused on identifying the 'basic tools of an adequate defense or appeal,' and we have required that such tools be provided to those defendants who cannot afford to pay for them."

Ake, 470 U.S. at 77, 105 S.Ct. at 1093 (citations omitted).

In determining whether due process demands a state-furnished psychiatrist under Ake's circumstances, the Court found several factors relevant: the private interest that will be affected by the action of the State, the governmental interest of the State that will be affected if the safeguard is to be provided, the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided. *Id.* at 77, 105 S.Ct. at 1093. Finding the defendant's interest in the accuracy of a criminal

trial to be "almost uniquely compelling," the state's interest to be only economic, and the need for psychiatric assistance critical, the Court determined that due process had required provision of a psychiatrist to Ake. The Court reasoned as follows:

> "[W]ithout the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high. With such assistance, the defendant is fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination."

Id. at 82, 105 S.Ct. at 1096. The Court held as follows:

> "We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."

Id. at 83, 105 S.Ct. at 1096.

B. The Scope of *Ake*

In the wake of *Ake,* several questions arise. *See generally* Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World,* 89 Cornell

L.Rev. 1305 (2004). These questions include whether *Ake* extends beyond the capital context, whether the right to expert assistance extends beyond the insanity context and to non-psychiatric experts, the nature of the assistance to which a defendant is entitled, and the threshold showing a defendant must make to trigger the right.

1. Application of *Ake* Beyond the Capital Context

Based on language in the concurring opinion of Chief Justice Burger in *Ake,* some courts have limited the application of *Ake* to capital cases. *See, e.g., Isom v. State,* 488 So.2d 12, 13 (Ala.Crim.App.1986); *Bannister v. State,* 726 S.W.2d 821, 828-30 (Mo.App.1987). Chief Justice Burger stated as follows:

> "The facts of the case and the question presented confine the actual holding of the Court. In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases. Nothing in the Court's opinion reaches non-capital cases."

Ake at 87, 105 S.Ct. at 1098 (Burger, C.J., concurring).

The majority of courts that have considered this question have concluded that *Ake* applies to non-capital cases. *See Cowley v. Stricklin,* 929 F.2d 640, 640 (11th Cir.1991); *Little v. Armontrout,* 835 F.2d 1240, 1243 (8th Cir.1987); *Palmer v. State,* 486 N.E.2d 477, 481-82 (Ind.1985); *State v. Coker,* 412 N.W.2d 589, 592-93 (Iowa 1987); *State v. Dunn,* 243 Kan. 414, 758 P.2d 718, 724-25 (1988); *Pertgen v. State,* 105 Nev. 282, 774 P.2d 429, 430-31 (1989); *State v. Campbell,* 127 N.H. 112, 498 A.2d 330, 332-33 (1985); *People v. Stone,* 195 Mich.App. 600, 491 N.W.2d 628, 631-

32 (1992); *State v. Barnett,* 909 S.W.2d 423, 427 (Tenn.1995); *Taylor v. State,* 939 S.W.2d 148, 152 (Tex.Crim.App.1996).

The Tennessee Supreme Court reasoned as follows:

> "We agree with the jurisdictions that have applied the *Ake* principle in the non-capital context because the due process principle of fundamental fairness requires that a State which prosecutes an indigent defendant assure that defendant of a fair opportunity to present his defense. It is axiomatic that fairness cannot exist where an indigent defendant is deprived by poverty of a meaningful opportunity to defend when his liberty is at stake. The due process principle of fundamental fairness applies to all criminal prosecutions, and does not rest upon the severity of the sanction sought or imposed."

Barnett, 909 S.W.2d at 428.

We agree, and conclude that *Ake* extends beyond the capital context and applies to non-capital cases.

2. Application of *Ake* Beyond the Insanity / Psychiatric Context

The next question that arises is whether *Ake* is restricted to cases in which the defendant's sanity is at issue. The majority of courts have concluded that *Ake* extends beyond psychiatric experts. *See, e.g., Terry v. Rees,* 985 F.2d 283, 284 (6th Cir.1993) (pathologist); *Dunn v. Roberts,* 963 F.2d 308, 313 (10th Cir.1992) (battered-spouse syndrome expert); *Scott v. Louisiana,* 934 F.2d 631, 633 (5th Cir.1991)

(ballistics expert); *Little v. Armontrout,* 835 F.2d 1240, 1243 (8th Cir.1987) (hypnotism expert); *Ex parte Moody,* 684 So.2d 114, 118-19 (Ala.1996) (applicable to non-psychiatric experts generally); *Ex parte Dubose,* 662 So.2d 1189, 1194 (Ala.1995) (DNA expert); *Ex parte Sanders,* 612 So.2d 1199, 1201-02 (Ala.1993) (ballistics expert); *Prater v. State,* 307 Ark. 180, 820 S.W.2d 429, 439 (1991) (DNA expert); *Doe v. Superior Court,* 39 Cal.App.4th 538, 45 Cal.Rptr.2d 888, 892-93 (1995) (experts on battered spouse and post-traumatic stress syndromes); *Cade v. State,* 658 So.2d 550, 555 (Fla.Dist.Ct.App.1995) (DNA expert); *Bright v. State,* 265 Ga. 265, 455 S.E.2d 37, 50 (1995) (toxicologist); *Crawford v. State,* 257 Ga. 681, 362 S.E.2d 201, 206 (1987) (serologist, psychologist, survey expert); *Thornton v. State,* 255 Ga. 434, 339 S.E.2d 240, 240-41 (1986) (forensic dentist); *People v. Lawson,* 163 Ill.2d 187, 206 Ill.Dec. 119, 644 N.E.2d 1172, 1192 (1994) (fingerprint and shoe print experts); *James v. State,* 613 N.E.2d 15, 21 (Ind.1993) (blood spatter expert); *State v. Coker,* 412 N.W.2d 589, 593 (Iowa 1987) (expert to assist with intoxication defense); *State v. Carmouche,* 527 So.2d 307, 307 (La.1988) (fingerprint expert, serologist); *Polk v. State,* 612 So.2d 381, 393 (Miss.1992) (DNA expert); *State v. Huchting,* 927 S.W.2d 411, 419 (Mo.Ct.App.1996) (DNA expert); *People v. Tyson,* 209 A.D.2d 354, 618 N.Y.S.2d 796-97 (N.Y.App.Div.1994) (voiceprint expert); *State v. Bridges,* 325 N.C. 529, 385 S.E.2d 337, 339 (1989) (fingerprint expert); *State v. Moore,* 321 N.C. 327, 364 S.E.2d 648, 656-58 (1988) (pathologist, non-psychiatrist physician, fingerprint expert); *State v. Mason,* 82 Ohio St.3d 144, 694 N.E.2d 932, 944-45 (1998) (non-psychiatric experts generally); *Rogers v. State,* 890 P.2d 959, 966 (Okla.Crim.App.1995) (any expert necessary for adequate defense); *State v. Rogers,* 313 Or. 356, 836 P.2d 1308, 1315 (1992) (opinion polling expert); *State v. Edwards,* 868 S.W.2d 682, 697 (Tenn.Crim.App.1993) (DNA expert);

Taylor v. State, 939 S.W.2d 148, 153 (Tex.Crim.App.1996) (DNA expert); *Rey v. State,* 897 S.W.2d 333, 338-39 (Tex.Crim.App.1995) (forensic pathologist).

The United States Supreme Court has not addressed this issue; in *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the Court did not rule explicitly on whether the state had an obligation to appoint other than a psychiatric expert for an indigent defendant. The Court denied the defendant's request for the appointment of a criminal investigator on the grounds that the defendant made no showing as to the reasonableness of his request and had only generally asserted a need. *Id.* at 323 n. 1, 105 S.Ct. at 2637 n. 1.

The United States Court of Appeals for the Eighth Circuit addressed the question and concluded that "there is no principled way to distinguish between psychiatric and non-psychiatric experts." *Little v. Armontrout,* 835 F.2d 1240, 1243 (8th Cir.1987), *cert. denied,* 487 U.S. 1210, 108 S.Ct. 2857, 101 L.Ed.2d 894 (1988). The court focused the issue as follows:

> "The question in each case must be not what field of science or expert knowledge is involved, but rather how important the scientific issue is in the case, and how much help a defense expert could have given.
>
> * * *
>
> Letrice Little demonstrated that an expert in hypnosis would have substantially aided his defense, and that the denial of such expert would and did have a material impact on his trial."

Id. at 1243-44.

In balancing the interests of the parties, the Supreme Court reasoned that the defendant's interest is in "the accuracy of [the] criminal proceeding," and that "the host of safeguards fashioned ... over the years to diminish the risk of erroneous conviction stands as a testament to that concern." *Ake* at 78, 105 S.Ct. at 1093. Wrongful convictions are not limited to cases involving psychiatric issues. Where the defendant's mental state excuses an otherwise criminal act, a psychiatrist often will be the relevant expert. But where the defendant's guilt turns on the interpretation of physical evidence within the competence of some other profession or learned field, an expert in that area may be no less indispensable. Accordingly, we join the vast majority of those jurisdictions having considered this issue and hold that the right announced in *Ake* is not limited to providing psychiatric experts. The principles enunciated in *Ake* apply in cases of non-psychiatric expert assistance when an indigent defendant makes the requisite showing that the requested assistance is needed for him or her to have "a fair opportunity to present his defense." *Ake,* 470 U.S. at 76, 105 S.Ct. at 1092.

C. Establishment of the Right to Expert Assistance

1. The Necessary Showing

We turn now to another issue left substantially unresolved in *Ake*-the level and specificity of the threshold showing a defendant must make to establish entitlement to expert assistance. Most courts that have considered the question of whether an indigent is entitled to public funded appointment of a non-psychiatric expert have applied the rationale expressed by the Supreme Court in *Ake.* Reading *Ake* and *Caldwell* together require that the State provide indigent defendants with the "basic tools of an adequate defense," *Ake,* 470 U.S. at 77, 105 S.Ct. at 1093, and, when the

required showing is made, require the appointment of non-psychiatric experts. Due process and equal protection require the State to provide non-psychiatric experts to indigent defendants when the defendant makes a particularized showing of the need for assistance of such experts. *See, e.g., Little v. Armontrout,* 835 F.2d 1240, 1245 (8th Cir.1987); *Moore v. Kemp,* 809 F.2d 702, 712 (11th Cir.1987); *Kennedy v. State,* 578 N.E.2d 633, 640 (Ind.1991); *State v. Coker,* 412 N.W.2d 589, 593 (Iowa 1987); *Harrison v. State,* 635 So.2d 894, 902 (Miss.1994); *Polk v. State,* 612 So.2d 381, 393 (Miss.1992); *State v. Mills,* 332 N.C. 392, 420 S.E.2d 114, 117 (1992); *State v. Edwards,* 868 S.W.2d 682, 697 (Tenn.Crim.App.1993); *Rey v. State,* 897 S.W.2d 333, 343 (Tex.Crim.App.1995).

It is clear that *Ake* does not mandate handing over the State's checkbook to indigent defendants and their attorneys. The Supreme Court reiterated that it has never "held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, *see Ross v. Moffitt,* 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974)" but had rather "focused on identifying the 'basic tools of an adequate defense or appeal.'" *Ake* at 77, 105 S.Ct. at 1093 (quoting *Britt v. North Carolina,* 404 U.S. 226, 227, 92 S.Ct. 431, 433, 30 L.Ed.2d 400 (1971)). Significantly, the Court's holding in *Ake* was predicated on the defendant having "demonstrat[ed] to the trial judge that his sanity at the time of the offense is to be a significant factor at trial." *Ake* at 83, 105 S.Ct. at 1096. Thus, in *Caldwell,* the Court terminated its inquiry when it found that "petitioner offered little more than undeveloped assertions that the requested assistance would be beneficial." *Caldwell,* 472 U.S. at 323 n. 1, 105 S.Ct. at 2637 n. 1.

The test that seems to have been adopted by the majority of courts considering the issue is the one enunciated by the United States Court of Appeals for the Eleventh Circuit in

Moore v. Kemp, 809 F.2d 702 (11th Cir.1987). The court concluded that *Ake* and *Caldwell* require that a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial. *Id.* at 712. The court explained as follows:

> "[A] defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial. Thus, if a defendant wants an expert to assist his attorney in confronting the prosecution's proof-by preparing counsel to cross-examine the prosecution's experts or by providing rebuttal testimony-he must inform the court of the nature of the prosecution's case and how the requested expert would be useful. At the very least, he must inform the trial court about the nature of the crime and the evidence linking him to the crime. By the same token, if the defendant desires the appointment of an expert so that he can present an affirmative defense, such as insanity, he must demonstrate a substantial basis for the defense, as the defendant did in *Ake.* In each instance, the defendant's showing must also include a specific description of the expert or experts desired; without this basic information, the court would be unable to grant the defendant's motion, because the court would not know what type of expert was needed. In addition, the defendant should inform the court why the particular expert is necessary. We recognize

> that defense counsel may be unfamiliar with the specific scientific theories implicated in a case and therefore cannot be expected to provide the court with a detailed analysis of the assistance an appointed expert might provide. We do believe, however, that defense counsel is obligated to inform himself about the specific scientific area in question and to provide the court with as much information as possible concerning the usefulness of the requested expert to the defense's case."

Id. at 712.

We agree with this formulation, and join those courts that have adopted it. *See, e.g., Page v. Lee,* 337 F.3d 411, 416 (4th Cir.2003); *Williams v. Collins,* 989 F.2d 841, 845-46 (5th Cir.1993); *Kordenbrock v. Scroggy,* 919 F.2d 1091, 1104 (6th Cir.1990); *Little v. Armontrout,* 835 F.2d 1240, 1244 (8th Cir.1987); *Tyson v. Keane,* 991 F.Supp. 314, 324-25 (S.D.N.Y.1998); *U.S. v. Ndanyi,* 45 M.J. 315, 319 (C.A.A.F.1996); *State v. Apelt,* 176 Ariz. 349, 861 P. 634, 651 (1993); *Crawford v. State,* 257 Ga. 681, 362 S.E.2d 201, 206 (1987); *Cade v. State,* 658 So.2d 550, 553 (Fla.Dist.Ct.App.1995); *State v. Touchet,* 642 So.2d 1213, 1216 (La.1994); *Taylor v. State,* 939 S.W.2d 148, 152 n. 3 (Tex.Crim.App.1996).

The manner in which the defendant may make this required showing will depend necessarily upon the purpose for which the defendant seeks the expert assistance. For example, if the defendant seeks an expert in order to confront the prosecution's proof, the defendant must inform the court how the expert would be useful in light of the prosecution's case. *Moore v. Kemp,* 809 F.2d at 712. This is not to say that a

defendant must predict to a certainty every detail of the prosecution's theory, or display a highly sophisticated understanding of the contribution the requested expert would make to the defense. Defense counsel does have, however, an obligation to become informed of the specific scientific area in question in order to explain the necessity of any requested expert to the court. *Id.* at 712.

The analysis of whether a defendant has fulfilled this obligation will be a dynamic one, dependent on the amount of discovery received, the extent to which a likely prosecution theory is obvious, the complexity of the scientific or technical issues, and other case-specific factors. For example, the *Moore v. Kemp* court opined:

> "In a jurisdiction ... which accords the defendant substantial discovery rights, the defendant should have no difficulty in demonstrating the theory of the government's case and outlining the evidence the prosecutor will probably present at trial. The difficulty of the defendant's task will vary depending on the scope of the jurisdiction's discovery rules. In a jurisdiction still employing 'trial by ambush,' the defendant might have to ask the court to make the prosecutor disclose the theory of his case and the results of any tests that may have been performed by government experts or at the government's request."

Moore v. Kemp, 809 F.2d at 712 n. 10 (citations omitted).

2. Availability of *Ex Parte* Proceedings

The Supreme Court, in *Ake,* referred to an *ex parte* hearing, stating that "[w]hen the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent." *Ake,* 470 U.S. at 82-83, 105 S.Ct. at 1096. Defendants may be required to reveal to the court the defense theory in order to demonstrate entitlement to expert assistance. A defendant may request that these disclosures be made *ex parte.* Paul C. Gianelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World,* 89 Cornell L.Rev. 1305, 1338, 1402-1404 (2004); *see generally* Kimberly J. Winbush, *Right of Indigent Defendant in State Criminal Prosecution to* Ex Parte In Camera *Hearing on Request for State-Funded Expert Witness,* 83 A.L.R.5th 541 (2000).

Courts have split as to the necessity of *ex parte* hearings. Several states have statutes requiring an *ex parte* hearing when an indigent defendant requests appointment of an expert. *See, e.g.,* Minn.Stat. § 611.21 (2003); S.C. Stat. § 16-3-26(c) (2003); Tenn.Code Ann. § 40-14-207(b) (2003); Nev.Rev.Stat. Ann. § 7.135 (Michie 1998); N.Y. County Law § 722-c (Consol.1977).

The courts in Alabama, Arkansas, Florida, Georgia, Hawaii, Indiana, Michigan, Oklahoma, Tennessee, Texas, and Washington have held that an *ex parte* hearing is required. *See Ex parte Moody,* 684 So.2d 114, 120 (Ala.1996); *Wall v. State,* 289 Ark. 570, 715 S.W.2d 208, 209 (1986); *Brooks v. State,* 259 Ga. 562, 385 S.E.2d 81, 83-84 (1989), *cert. denied,* 494 U.S. 1018, 110 S.Ct. 1323, 108 L.Ed.2d 498 (1990); *Arnold v. Higa,* 61 Haw. 203, 600 P.2d 1383, 1385 (1979); *Stanger v. State,* 545 N.E.2d 1105, 1115 (Ind.App.1989); *People v. Loyer,* 169 Mich.App. 105, 425 N.W.2d 714, 722

(1988); *McGregor v. State,* 733 P.2d 416, 416-17 (Okla.Crim.App.1987); *Barnett,* 909 S.W.2d at 428; *Williams v. State,* 958 S.W.2d 186, 192-94 (Tex.Crim.App.1997); *State v. Newcomer,* 48 Wash.App. 83, 737 P.2d 1285, 1291 (1987).

The courts in Arizona, South Dakota, and Virginia have held that whether to hold an *ex parte* hearing is within the trial court's discretion. *See State v. Apelt,* 176 Ariz. 349, 861 P.2d 634, 650 (1993); *State v. Floody,* 481 N.W.2d 242, 254-56 (S.D.1992); *Ramdass v. Commonwealth,* 246 Va. 413, 437 S.E.2d 566, 571 (1993), *vacated on other grounds,* 512 U.S. 1217, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994). Louisiana requires an indigent defendant to show that he or she would be prejudiced if the hearing was not held *ex parte. State v. Touchet,* 642 So.2d 1213, 1220 (La.1994). The North Carolina Supreme Court has held that an *ex parte* hearing is required when the request is for a psychiatrist, *State v. Ballard,* 333 N.C. 515, 428 S.E.2d 178, 180 (1993), but not required when the request is for a non-psychiatric expert. *State v. Phipps,* 331 N.C. 427, 418 S.E.2d 178, 190-91 (1992).

We believe the better view is that an *ex parte* hearing, when timely requested, is required. *See generally* Justin B. Shane, *Money Talks: An Indigent Defendant's Right to an* Ex Parte *Hearing for Expert Funding,* 17 Cap. Def. J. 347 (2005); Giannelli, *supra,* at 1403-04. Indigent defendants seeking state funded experts should not be required to disclose to the State the theory of the defense when non-indigent defendants are not required to do so. *See, e.g., Barnett,* 909 S.W.2d at 428 (holding that "[i]ndigent defendants who must seek state-funding to hire a[n] ... expert should not be required to reveal their theory of defense when their more affluent counterparts, with funds to hire experts, are not required to reveal their theory of defense.")

In *Moody,* the Alabama Supreme Court discussed this issue as follows:

> "Requiring an indigent defendant to prematurely disclose evidence in a hearing where the state is present encroaches on the privilege against self-incrimination, which applies at all stages of a criminal proceeding. The privilege against self-incrimination 'does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution.' *Maness v. Meyers,* 419 U.S. 449, 461, 95 S.Ct. 584, 592, 42 L.Ed.2d 574 (1975).
>
> There should be equality between 'indigents and those who possess the means to protect their rights.' *United States v. Tate,* 419 F.2d 131 (6th Cir.1969). An indigent defendant should not have to disclose to the state information that a financially secure defendant would not have to disclose."

Moody, 684 So.2d at 120. We agree.

IV. Article 27A and State Funding of Experts

Before considering whether the State had a constitutional duty to fund Moore's request, we must address Moore's contention that it had a statutory duty to do so through the O.P.D. Moore contends that Art. 27A, which governs the powers and responsibilities of the Office of the Public

Defender, mandated that the Public Defender fund his request even though he was not a client of the O.P.D. We must resolve whether Article 27A requires the O.P.D. to provide the services petitioner requests without concomitant representation by the Office. The State contends that Art. 27A should be read to provide that the duty of the Public Defender to provide "related necessary services" connected with representation of indigents need be furnished to an indigent defendant only if the O.P.D. is representing that defendant.

The General Assembly of Maryland, in setting up the O.P.D., declared that it was establishing that agency with the policy and legislative intent to provide for representation of indigents in criminal and juvenile proceedings, including related necessary services and facilities. Art. 27A § 1. "Indigent" is defined as follows:

> " 'Indigent' means any person taken into custody or charged with a serious crime ... who under oath or affirmation subscribes and states in writing that he is financially unable, without undue hardship, to provide for the full payment of an attorney and all other necessary expenses of legal representation."

Art. 27A § 2. Art. 27A § 4(a), sets out the duty of the O.P.D. to provide legal representation as follows:

> "It shall be the primary duty of the Public Defender to provide legal representation for any indigent defendant eligible for services under this article. Legal representation may be provided by the Public Defender, or, subject to the supervision of the Public Defender, by his deputy, by district public

> defenders, by assistant public defenders, or by panel attorneys as hereinafter provided for."

Eligibility for the services of the O.P.D. is determined on the basis of the need of the defendant. Art. 27A § 7(a). The reasonable value of any services rendered to a defendant pursuant to Art. 27A constitutes a lien on real and personal property in which the defendant has or acquires an interest in, excluding his or her residence. Art. 27A § 7(d).

The statute is silent as to whether representation by the O.P.D. and ancillary services are severable. The Court of Special Appeals addressed this issue and held that "the dual services provided by the public defender are not severable." *Moore,* 154 Md.App. at 592, 841 A.2d at 39. The intermediate appellate court explained as follows:

> "We agree with those states which hold that the dual services provided by the public defender are not severable. The language of Art. 27A § 2, defining indigent as a person unable 'to provide for the full payment of a attorney and all other necessary expenses of legal representation,' is a unified enactment and does not contemplate that a defendant could be indigent for purposes of 'all other necessary expenses' and yet able to retain private counsel. We adopt Kentucky's position that, '[u]nder this definition and the general tenor of the entire Act, inability to obtain counsel and inability to obtain necessary services go hand in hand.' Thus, any funding for the necessary services associated with representation are conditioned upon representation by the Public Defender."

Moore, 154 Md.App. at 592, 841 A.2d at 39 (citations omitted).

We agree with the Court of Special Appeals and hold that the O.P.D. is not required to pay for expert assistance or other ancillary services if the defendant is not represented by the O.P.D. (or a panel attorney assigned by the O.P.D.). The operative part of the statutory definition of "indigent" contained in Art. 27A is that the defendant is financially unable, without undue hardship, to provide for the *full payment of an attorney* and all other necessary expenses of legal representation. The services provided by the O.P.D. are not severable. In order for the defendant to qualify for the benefits provided under the Act and thereby require the O.P.D. to pay for services, the defendant must be without independent means to obtain counsel.

V. Satisfaction of Moore's *Ake* Rights in the Instant Case

A. Provision of Expert Services Through the O.P.D.

The bottom line question in this case is whether the State has satisfied its constitutional obligations by establishing the O.P.D., making expert services available to clients of that Office, and requiring that, in order for an indigent to receive State-funded expert services, the defendant *must* seek representation by O.P.D. We conclude that the State has not deprived petitioner of any of his constitutional rights by requiring that he apply to the O.P.D. for representation before he is entitled as an indigent to State funded expert witness services. The Supreme Court contemplated in *Ake* that States could place restrictions on indigent defendants' access to state-funded expert services. The Court stated as follows:

> "This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the State the decision on how to implement this right."

Ake, 470 U.S. at 83, 105 S.Ct. at 1096. Thus, while a State might provide funds enabling indigent defendants with retained counsel to hire experts of their own choosing, *Ake* does not require this approach.

Moore is correct that, if he is indigent, he has a right under *Ake* to state-paid supporting services necessary to an adequate defense.[8] As we have indicated, *supra,* Maryland has established a State-wide public defender system which provides legal representation, investigative services, and expert assistance to persons deemed indigent under Art. 27A § 2. In 1971, the Legislature created the Office of the Public Defender. *See* 1971 Md. Laws, Ch. 209 at 486-94. The purpose of the statutes creating that agency was set forth as follows:

> "It is hereby declared to be the policy of the State of Maryland to provide for the realization of the constitutional guarantees of counsel in the representation of indigents, *including related necessary services and facilities,* in criminal and juvenile proceedings

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[8] We do not reach the question of whether Moore made the required showing, as discussed *supra,* that the services he requested were in fact necessary to an adequate defense.

> within the State, and to assure effective assistance and continuity of counsel to indigent accused taken into custody and indigent defendants in criminal and juvenile proceedings before the courts of the State of Maryland, and to authorize the Office of Public Defender to administer and assure enforcement of the provisions of this article in accordance with its terms."

Art. 27A § 1 (emphasis added).

State v. Miller, 337 Md. 71, 651 A.2d 845 (1994), is instructive on the question of whether the State may condition the receipt of constitutionally mandated services on representation by the O.P.D. The indigent petitioner in that case, Bernard Miller, had been convicted at trial of kidnapping, robbery, murder, and other related offenses. On appeal, as at trial, he was represented by private counsel on a *pro bono* basis. Miller had refused the representation of the O.P.D., and further refused to permit his attorney to seek appointment as an assigned public defender and thereby submit to the supervision of the O.P.D. Had Miller's counsel taken this step, the O.P.D. would have borne the costs of obtaining a stenographic transcript of the trial proceedings. *Id.* at 74-75, 651 A.2d at 846.

Miller filed in the Circuit Court a motion requesting that the court furnish a transcript without charge. The Circuit Court denied the motion on the grounds that Md. Rule 1-325(b) required the court to pay for a transcript only where a party was eligible for O.P.D. representation, had applied to the O.P.D., and had been declined representation by that agency. *Id.* at 75, 651 A.2d at 846.

On appeal, Miller argued that the requirement that he be represented by, or denied representation by, the O.P.D. before receiving a free transcript violated his rights to equal protection and assistance of counsel. We affirmed the Circuit Court. After ruling that the court had correctly interpreted Md. Rule 1-325(b), we noted that under *Griffin v. Illinois,* 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits a state from foreclosing all opportunity for appellate review by refusing, based solely on a defendant's indigence, to provide a trial transcript. But we also noted that Justice Black, in his plurality opinion, stated, "We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The [Illinois] Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants." *Id.* at 20, 76 S.Ct. at 591.

We then noted that "[a]llowing the states to create reasonable alternative systems by which the constitutional rights of indigents would be protected is a concept that has been applied to other rights of indigent defendants as well." *Miller,* 337 Md. at 83, 651 A.2d at 850. With respect to equal protection, we concluded as follows:

> "Miller *is* entitled to a free transcript, but he cannot receive it on his own terms; he must go through the Office of the Public Defender. The State is free to place reasonable restrictions on the exercise of Miller's rights, and Rule 1-325(b) is neither arbitrary nor unreasonable in its language or application. There can be no equal protection violation when an individual is denied a right simply because of his own failure to comply with reasonable state procedures and regulations."

Miller, 337 Md. at 85-86, 651 A.2d at 852.

Turning to Miller's Sixth Amendment claim, we noted that the Supreme Court has held that although an indigent criminal defendant enjoys the right to assistance of counsel, this entitlement does not translate into an absolute right to counsel of the defendant's choosing. *Id.* at 86-87, 651 A.2d at 852; *see Wheat v. United States,* 486 U.S. 153, 159, 108 S.Ct. 1692, 1697, 100 L.Ed.2d 140 (1988) ("the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers"); *accord Fowlkes v. State,* 311 Md. 586, 605, 536 A.2d 1149, 1159 (1988) ("for indigent defendants ... the right to counsel is but a right to effective legal representation; it is not a right to representation by any particular attorney"). We concluded as follows:

> "Failure to provide a free transcript to the indigent appellant cannot interfere with the right to choice of counsel where no such absolute right exists. In the absence of such a right to choice of counsel, there is no constitutional violation when the State requires that an indigent defendant avail himself of the services of the Office of the Public Defender in order to obtain a free transcript.
>
> The State has set up a system by which all indigent appellants are provided effective assistance of counsel, whether represented by the Public Defender's Office or by a private attorney under the supervision of that office. Miller cannot pick and choose which of the State-provided services he wishes to receive;

> he must accept the available resources as provided under Art. 27A and the Maryland Rules. Miller has not been denied his right to assistance of counsel, because he may apply to the Office of the Public Defender and receive effective representation. The Public Defender system is Maryland's 'alternative solution' as described in *Griffin* and *Bounds* [*v. Smith,* 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977)], *supra.* Public Defender representation, like a transcript, is part of the 'package' provided by the State, and requiring Miller to comply with reasonable State procedures in no way infringes upon his right to assistance of counsel."

Miller, 337 Md. at 87-88, 651 A.2d at 853. The United States Court of Appeals for the Fourth Circuit, sitting *en banc,* agreed with our holding on federal habeas corpus review. *Miller v. Smith,* 115 F.3d 1136 (4th Cir.1997) (*en banc*), *cert. denied sub nom. Miller v. Corcoran,* 522 U.S. 884, 118 S.Ct. 213, 139 L.Ed.2d 148 (1997).

Our holding in *Miller* governs the outcome of the case *sub judice.* Although the Maryland Rules contain no analogue to Md. Rule 1-325(b) with respect to the appointment of experts, the practical effect of nonseverable O.P.D. services under Art. 27A is the same. Indigent defendants may utilize the O.P.D.'s complete "package" of services, or forgo them entirely. While such defendants may face difficult choices, the Constitution does not bar the State of Maryland from requiring them to choose between counsel of their choice and ancillary services provided by the O.P.D.

Assuming *arguendo* that the assistance of a DNA expert was necessary to an adequate defense in the instant case, the State

did not deny Moore that assistance. Rather, expert assistance was available to him so long as he complied with the procedural requirement that he apply for legal representation through the O.P.D. Imposing this requirement on Moore did not violate his constitutional rights. *See Wheat,* 486 U.S. at 159, 108 S.Ct. at 1697; *Bounds v. Smith,* 430 U.S. 817, 830, 97 S.Ct. 1491, 1499, 52 L.Ed.2d 72 (1977); *Fowlkes,* 311 Md. at 605, 536 A.2d at 1159.

B. Insufficiency of Discovery and Cross-Examination Alone

Although we affirm the judgment of the Court of Special Appeals, we disagree with one significant aspect of its opinion. The intermediate appellate court agreed with the State's contention that Moore's constitutional rights were satisfied by the State's disclosure of the Cellmark documents and reports during discovery. The court stated as follows:

> "[T]here is nothing to indicate that Cellmark's evaluation of the samples was not impartial, scientific, and objective. Additionally, appellant's counsel was provided with all the DNA documents and reports generated by Cellmark prior to trial in order to prepare a defense. Thus, the State provided expert analysis and any constitutional duty had ended after that point."

Moore v. State, 154 Md.App. 578, 598, 841 A.2d 31, 42 (2004).

The intermediate appellate court based its holding in part on *Johnson v. State,* 292 Md. 405, 439 A.2d 542 (1982), in which we held that a defendant found by the trial court to be competent to stand trial following a court-ordered evaluation by psychiatrists at a State hospital was not entitled to a

private psychiatrist of his own choosing to assist in his defense at State expense. *Id.* at 415, 439 A.2d at 549. We stated as follows:

> "Here, Johnson was evaluated by a team of independent psychiatric experts, he was furnished with copies of the resulting reports prepared by the examiners, and he had the opportunity to subpoena and question at trial members of the examining team. Whatever the amount of required State assistance for the appointment of defense experts to enable the indigent to place this issue of insanity before the trial court, we need not determine here, for it is certain that once an accused is evaluated by state funded, impartial and competent psychiatrists, that constitutional duty, if any, ends. '[T]he State has no constitutional obligation to promote a battle between psychiatric experts by supplying defense counsel with funds wherewith to hunt around for other experts who may be willing, as witnesses for the defense, to offer the opinion that the accused is criminally insane.'"

Id. (Citations omitted).

In light of *Ake,* decided three years after *Johnson,* it appears to us that our holding in *Johnson* has been overruled implicitly to the extent it suggests that the report of a State-employed expert who does not "assist in evaluation, preparation, and presentation of the defense" would be constitutionally sufficient.

We find numerous passages from *Ake* supportive of the proposition that due process requires the provision of a defense expert. We find the following language particularly revealing:

> "We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination *and assist in evaluation, preparation, and presentation of the defense.*"

Ake, 470 U.S. at 83, 105 S.Ct. at 1096 (emphasis added).

> "[T]he assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists ... *know the probative questions to ask of the opposing party's* psychiatrists and how to interpret their answers."

Id. at 80, 105 S.Ct. at 1095 (emphasis added);

> "[T]he psychiatrists *for each party* enable the jury to make its most accurate determination of the truth on the issue before them."

Id. at 81, 105 S.Ct. at 1095.

> "[W]ithout the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, *and to assist in preparing the cross-examination of a State's psychiatric*

> *witnesses,* the risk of an inaccurate resolution of sanity issues is extremely high."

Id. at 82, 105 S.Ct. at 1096 (emphasis added);

> "[E]xperts are often necessary both for prosecution and for defense.... [A] defendant may be at an unfair disadvantage, if he is unable because of poverty to parry by his own witnesses the thrusts of those against him."

Id. at 82 n. 8, 105 S.Ct. at 1095 n. 8 (quoting *Reilly v. Berry,* 250 N.Y. 456, 166 N.E. 165, 167 (1929) (Cardozo, C.J.)).

The weight of authority among courts that have considered the issue suggests that the services of a defense expert are required. *See, e.g., Powell v. Collins,* 332 F.3d 376, 392 (6th Cir.2003); *Starr v. Lockhart,* 23 F.3d 1280, 1291 (8th Cir.1994); *Cowley v. Stricklin,* 929 F.2d 640, 644 (11th Cir.1991); *Smith v. McCormick,* 914 F.2d 1153, 1156-59 (9th Cir.1990); *United States v. Sloan,* 776 F.2d 926, 929 (10th Cir.1985); *Buttrum v. Black,* 721 F.Supp. 1268, 1312-13 (N.D.Ga.1989); *Lindsey v. State,* 254 Ga. 444, 330 S.E.2d 563, 566-67 (1985); *People v. Lawson,* 163 Ill.2d 187, 206 Ill.Dec. 119, 644 N.E.2d 1172, 1192 (1994); *Binion v. Commonwealth,* 891 S.W.2d 383, 386 (Ky.1995); *Polk v. State,* 612 So.2d 381, 394 (Miss.1992); *State v. Gambrell,* 318 N.C. 249, 347 S.E.2d 390, 395 (1986); *De Freece v. State,* 848 S.W.2d 150, 159 (Tex.Crim.App.1993). *Contra, Granviel v. Lynaugh,* 881 F.2d 185, 191 (5th Cir.1989) (holding that a court-appointed psychiatrist, whose opinion and testimony is available to both sides, satisfies the defendant's rights"); *Commonwealth v. Reid,* 537 Pa. 167, 642 A.2d 453, 457 (1994) (finding *Ake* satisfied when trial court offered indigent defendant the "opportunity to be examined by a neutral court-appointed psychiatrist"); *see also People v. Leonard,* 224 Mich.App. 569, 569 N.W.2d

663, 671 (1997) (trial court's refusal to appoint DNA expert did not deny defendant effective assistance of counsel where defense attorney-who had undergraduate degree in chemistry-"effectively and comprehensively cross-examined the prosecution's experts" after receiving discovery of all documents relating to DNA analysis in the case).

In his comprehensive and thoroughly researched law review article, Professor Paul Giannelli addresses this issue as follows:

> "Appellate courts often cite the fact that the cross-examination of the prosecution expert was effective as a reason why a defense expert was not needed.
>
> * * *
>
> First, the same reasoning applies when prosecutors seek a psychiatric evaluation of an accused who has raised an insanity defense ... and yet virtually every jurisdiction has procedures recognizing the prosecution's right to have the accused examined by a state psychiatrist-a prosecution expert. The rationale for this procedure is obvious: the adversary system would be undermined if the prosecution was deprived of its own expert.
>
> Second, effective cross-examination of a prosecution expert frequently requires the advice of a defense expert....
>
> Third, there is a significant difference between attacking the opinion of an opponent's expert through cross-examination

> and attacking that opinion through the testimony of your own expert. In *Daubert* [*v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596, 113 S.Ct. 2786, 2798, 125 L.Ed.2d 469 (1993)] the Supreme Court noted that '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.' In 1983, the Court upheld the admissibility of expert testimony concerning future dangerousness in capital cases. In so ruling, the Court noted that 'jurors should not be barred from hearing the views of the State's psychiatrists along with opposing views of the defendant's doctors.' Similarly, the 1992 report of the National Academy of Sciences observed that '[m]ere cross examination by a defense attorney inexperienced in the science of DNA testing will not be sufficient.' ...
>
> Finally, if this factor is relevant at all, it would only be so on appellate review under a harmless error analysis. After all, a trial court cannot wait to review the defense counsel's cross-examination before appointing a defense expert."

Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World,* 89 Cornell L.Rev. 1305, 1376-78 (2004) (citations omitted).

When a defendant has made the threshold showing described *supra,* the State must, at a minimum, assure the defendant access to a defense expert who will assist in evaluation, preparation, and presentation of the defense. We reject the

holding of the Court of Special Appeals-relied upon by the State before this Court-that Moore's *Ake* rights were satisfied by discovery and the opportunity to cross-examine Dr. Cotton. The State satisfied the Due Process Clause, as interpreted in *Ake,* by making expert assistance available to Moore through the O.P.D., conditioned on representation by that agency.

VI. Exclusion of Evidence Regarding Scott Brill's Alleged Prior Acts of Violence

Moore also contends that the Circuit Court erred in precluding him from introducing evidence of Scott Brill's history of violence by cross-examining State's witnesses Crystal Brill and Danielle Ritter about Scott Brill's alleged assaults against them. The trial court excluded this evidence on the grounds that such evidence constituted other crimes evidence and was therefore inadmissible under Md. Rule 5-404(b). Moore contends that evidence of Brill's history of violence towards women made it more likely that Brill-rather than Moore, who had no such history-had killed Mason. We disagree.

Crystal Brill testified on behalf of the State. On cross-examination, to show Brill's pattern of violence, Moore's counsel asked if her brother, Scott Brill, had assaulted her. The State objected on the ground that the evidence was inadmissible as evidence of other crimes. The trial court sustained the objection. Danielle Ritter also testified as a State's witness. On cross-examination, Moore's counsel asked "Do you know if Scott Brill-does Scott Brill ever get angry with you and hit you?" The State again objected on the grounds that the evidence was inadmissible as evidence of other crimes. The trial court again sustained the objection.

Moore argues the evidence was admissible because it was relevant, and not excluded by Md. Rule 5-404(b). Moore is correct that the State's "other crimes" objection was misplaced. The ban contained in Md. Rule 5-404(b) on "[e]vidence of other crimes, wrongs, or acts ... to prove the character of a person in order to show action in conformity therewith" applies only to the acts of the defendant, not those of other persons. *See Sessoms v. State*, 357 Md. 274, 284, 744 A.2d 9, 15 (2000). Md. Rule 5-404(b) was not a proper basis to exclude the evidence, assuming it was relevant.

We do not agree with petitioner, however, that the evidence was admissible. Even if Brill had a propensity of violence towards women, it would not make it more likely, or less likely, that Brill committed the murder alone. It was always the State's theory of the case that Brill and Moore had acted together in killing Mason. The evidence was not relevant; thus, the trial court did not abuse its discretion in excluding it. Evidence that is not relevant is not admissible. *See* Md. Rule 5-402.

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED. COSTS TO BE PAID BY PETITIONER.

BELL, C.J., dissents.

Dissenting Opinion by BELL, C.J.

The issue in this case is the applicability of the holding in *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), regarding State funding of experts and expert-related services, to non-psychiatric experts and in the non-capital context, and, if it does apply to those situations, how the threshold determination is made and of what does it consist? After extensive review and discussion of the Supreme Court's opinion in *Ake,* the majority concludes that the right to State-funded defense experts is a constitutional right, *Moore v. State,* 390 Md. 343, 382-84, 889 A.2d 325, 347-49 (2005) grounded in due process. 390 Md. at 380-81, 889 A.2d at 346-47.

The majority concludes that the principles enumerated in *Ake* apply in the non-capital context, 390 Md. at 363-64, 889 A.2d at 336-37, and in cases involving non-psychiatric experts, 390 Md. at 403-06, 889 A.2d at 361-62. As to the threshold showing required, it is, the majority holds, "that there exists a reasonable probability[9] both that an expert

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[9] I do not agree that the threshold burden is so high; rather, I believe it to be "reasonable possibility." I believe that, by analogy, the standard articulated by this Court in *Dorsey v. State* to determine whether improperly admitted evidence contributed to a conviction applies. 276 Md. 638, 350 A.2d 665 (1976) (holding that the reviewing court must thus be satisfied that there is no reasonable possibility that evidence complained of, whether erroneously admitted or excluded, may have contributed to rendition of guilty verdict). *See also Yorke v. State,* 315 Md. 578, 556 A.2d 230 (1989) (in regards to newly discovered evidence, favoring a standard that falls between "probable," which is less demanding than "beyond a reasonable doubt," and "might" which is less stringent than probable, and establishing that the inquiry is whether there is a "possibility that the verdict of the trier of fact would have been affected") (emphasis added); *Gross v. State,* 371 Md. 334, 347, 809 A.2d 627, 635 (2002) (holding regarding Sixth Amendment prejudice, "[i]f *(cont'd)*

would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial." 390 Md. at 368, 889 A.2d at 339-40. Except for the level of the required showing, I am in general agreement on these points.

Although concluding that there is a right to State-funded expert services, the majority accepts the Court of Special Appeals' holding that Moore's *Ake* rights-his entitlement to State-funded expert services-were satisfied. This is so, the majority says, because the Office of the Public Defender ("OPD") will provide these services, so long as he is represented by an OPD attorney. 390 Md. at 374, 889 A.2d at 343. This conclusion is dictated, it submits, by *State v. Miller,* 337 Md. 71, 651 A.2d 845 (1994) and the Public Defender statute, Md.Code (1957, 2003 Repl.Vol., 2004 Cum.Supp.), Art. 27A. I disagree with this conclusion.

A.

In *Miller,* the defendant Bernard Miller ("Miller") was convicted of murder. His *pro bono,* private counsel filed an appeal and, to prepare for that appeal, requested that a transcript of the trial proceedings be furnished to him free of charge. He relied on *Griffin v. Illinois,* 351 U.S. 12, 18-19, 76 S.Ct. 585, 590-591, 100 L.Ed. 891, 898-899 (1956), which held that a state could not refuse to provide a transcript solely on the basis of the defendant's indigency. Not wanting the OPD involved in any way, Miller did not seek and, indeed, refused to request, representation by the OPD. His attorney also did not seek appointment as an

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there is no reasonable possibility that the appellate court would have ruled in his favor, there can be no *Strickland* prejudice").

"assigned public defender" to represent Miller on appeal with the supervision of the OPD and would have refused such an appointment. 337 Md. at 74, 651 A.2d at 846. Relying on Maryland Rule 1-325(b),[10] the Circuit Court for Howard County denied the request.

The Court of Special Appeals reversed. *Miller v. State,* 98 Md.App. 634, 635 A.2d 1 (1993). That court construed Rule 1-325(b) as applicable to the exact situation that Miller faced; it held: "where an indigent appellant who otherwise would qualify for representation by the Public Defender chooses to be represented by a qualified private attorney and that

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[10] Maryland Rule 1-325(b) provides:

"(a) *Generally.* A person unable by reason of poverty to pay any filing fee or other court costs ordinarily required to be prepaid may file a request for an order waiving the prepayment of those costs. The person shall file with the request an affidavit verifying the facts set forth in that person's pleading, notice of appeal, application for leave to appeal or request for process, and stating the grounds for entitlement to the waiver. If the person is represented by an attorney, the request and affidavit shall be accompanied by the attorney's signed certification that the claim, appeal, application, or request for process is meritorious. The court shall review the papers presented and may require the person to supplement or explain any of the matters set forth in the papers. If the court is satisfied that the person is unable by reason of poverty to pay the filing fee or other court costs ordinarily required to be prepaid and the claim, appeal, application, or request for process is not frivolous, it shall waive by order the prepayment of such costs.

"(b) *Appeals Where Public Defender Representation Denied-Payment by State.* The court shall order the State to pay the court costs related to an appeal or an application for leave to appeal and the costs of preparing any transcript of testimony, brief, appendices, and record extract necessary in connection with the appeal, in any case in which (1) the Public Defender's Office is authorized by these rules or other law to represent a party, (2) the Public Defender has declined representation of the party, and (3) the party is unable by reason of poverty to pay those costs."

attorney elects to represent the appellant without fee of any kind or from any person, strictly on a *pro bono* basis, the Public Defender is obliged to provide the necessary transcript and ... pay the cost of the brief and other necessary documents as well." *Id.* at 645, 635 A.2d at 6.

We granted the state's petition for certiorari. In this Court, the State argued that, while Miller was entitled to a free transcript, he must comply with Rule 1-325(b), Maryland's "method" of supplying indigent defendants with trial transcripts, believing it to be a reasonable exercise of an indigent's right to appeal. Miller, on the other hand, contended that *Griffin* mandated that he receive a free transcript and that Rule 1-325(b) denied him his Sixth Amendment right to assistance of counsel. This Court reversed the judgment of the Court of Special Appeals. Siding with the State, it held that an indigent defendant who had not sought, nor been refused, representation by the OPD was not entitled to a free State-funded trial transcript.

Analyzing the applicability of Rule 1-325(b), the Court traced the Rule from its historical root, Ch. 1068 of the Acts of 1945, codified as Maryland Code (1939, 1947 Cum.Supp.), Art. 5, § 88A, which required the State to prepare a transcript for indigent appellants in capital criminal cases, to its amendment to comply with the *Griffin* mandate, Ch. 68 of the Acts of 1958, codified as Md.Code (1957, 1963 Cum.Supp.) Art. 5, 15A, to the promulgation of its predecessor, Maryland Rule 883 b (1958). *State v. Miller,* 337 Md. 71, 77, 651 A.2d 845, 847 (1994). We also focused on the legislative history of the Public Defender statute and of Rule 1-325(b). The latter focus was primarily on language in the minutes of the Rules Committee, which added the requirement that the OPD refuse representation before providing a free transcript to indigent defendants so as to "avoid abuse of the Rule by defendants attempting to do

an end run around the Public Defender's Office." Rules Committee March 14-15, 1986, Minutes at 50. Those minutes reflected that the Committee questioned whether a rule requiring OPD refusal of representation as a condition for obtaining a free transcript would be constitutional, wondering particularly how such a rule would work when an indigent defendant had *pro bono* counsel or wanted to proceed *pro se*. The Chief Attorney of the Public Defender's Office responded:

> "The proposed rule would not be an obstacle to the indigent appellant who wants to proceed with *pro bono* counsel. It has been the practice of the Public Defender's Office to cooperate with individual attorneys, law schools and other organizations willing to provide *pro bono* representation to indigent appellants. This cooperative arrangement has not presented problems in the past."

Memorandum from Dennis M. Henderson, Chief Attorney, Appellate Division, Office of the Public Defender, to Julia M. Freit, Reporter, Rules Committee, p. 6 (June 10, 1986).

Unlike the Court of Special Appeals, which had construed the "cooperation" described in the memorandum to mean that the OPD not object to providing a free transcript to indigent defendants who wished to proceed with *pro bono* counsel, 98 Md.App. at 645, 635 A.2d at 6, this Court interpreted the words, "cooperative arrangement," to mean that the OPD would work together with *pro bono* counsel and make arrangements for the provision of the free transcript. 337 Md. 71, 80-81, 651 A.2d 845, 849. We viewed Rule 1-325(b) as extending the framework of Art. 27A by identifying the OPD as the "gatekeeper" against abuse of State resources, 337 Md. 71, 81, 651 A.2d 845, 849-

850, and as furthering the legislative goals of effective indigent representation by setting up the OPD as an "evaluator" of attorney competency:

> "The instant case demonstrates vividly how the legislative will can be frustrated by an indigent who for unspecified reasons has adamantly refused to cooperate in any way with the Public Defender. Md. Rule 1-325(b) expressly prevents such non-cooperation, which could lead to an appeal ineffectively conducted and a further expenditure of funds for a second appeal."

337 Md. at 81-82, 651 A2d at 850. Thus, this Court concluded, Rule 1-325(b) required, as a condition for receiving a free trial transcript, that an indigent defendant apply for representation from the OPD. *Id.* at 82, 651 A.2d at 850. That condition did not constitute a difference based on his economic status, noting that it "depends on [Miller's] willingness to cooperate and follow the reasonable procedures set forth in Art. 27A and the Maryland Rules. But for his intransigence, this system would work, and Miller would receive a free transcript." *Id.* at 85, 651 A.2d at 851. Therefore, Miller was not receiving an unequal type of appeal. There was no *Griffin* violation.

The Court rejected Miller's Sixth Amendment argument. It reasoned that indigent defendants did not have an absolute right to counsel of choice; the Sixth Amendment provided for the right to effective representation, and not the right to representation by a particular attorney. *Wheat v. United States,* 486 U.S. 153, 159, 108 S.Ct. 1692, 1697, 100 L.Ed.2d 140, 148 (1988). This Court stated:

> "Failure to provide a free transcript to the indigent appellant cannot interfere with the right to choice of counsel where no such absolute right exists. In the absence of such a right to choice of counsel, there is no constitutional violation when the State requires that an indigent defendant avail himself of the services of the Office of the Public Defender in order to obtain a free transcript."
>
> "The State has set up a system by which all indigent appellants are provided effective assistance of counsel, whether represented by the Public Defender's Office or by a private attorney under the supervision of that office. Miller cannot pick and choose which of the State-provided services he wishes to receive; he must accept the available resources as provided under Art. 27A and the Maryland Rules. Miller has not been denied his right to assistance of counsel, because he may apply to the Office of the Public Defender and receive effective representation. The Public Defender system is Maryland's 'alternative solution' as described in *Griffin* and *Bounds [v. Smith,* 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977).] Public Defender representation, like a transcript, is part of the 'package' provided by the State, and requiring Miller to comply with reasonable State procedures in no way infringes upon his right to assistance of counsel."

Miller, 337 Md. at 87-88, 651 A.2d at 853.

In the case *sub judice,* the majority extends *Miller* to the broad spectrum of ancillary services, not heretofore addressed, on the basis of attorney status and the non-severability of OPD representation and other services, and nothing more. 390 Md. at 378, 889 A.2d at 345-46. It does so by applying, notwithstanding the absence of a Rule comparable to Rule 1-325(b), the same analysis to how Art. 27A meshes Ake's holding with respect to State provision of ancillary services as it applied in *Miller* with regard to trial transcripts. To achieve the result it does, the majority relies heavily on the fact that the Public Defender statute provides that it is the duty of the OPD to supply legal representation and other related services to the indigent defendants. Having declared it to "be the policy of the State of Maryland to provide for the realization of the constitutional guarantees of counsel in the representation of indigents, including related necessary services and facilities, in criminal and juvenile proceedings within the State, and to assure effective assistance and continuity of counsel to indigent accused taken into custody and indigent defendants in criminal and juvenile proceedings before the courts of the State of Maryland," Art. 27A, § 1 "authorize [s] the Office of Public Defender to administer and assure enforcement of the provisions of this article in accordance with its terms." Section 2(f), [11] in defining "indigent," delineates the perimeters of the services to be provided by the OPD: "the

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[11] Art. 27A, § 2 provides:

"(f) 'Indigent' means any person taken into custody or charged with a serious crime as herein defined under the laws of the State of Maryland or the laws and ordinances of any county, municipality, or Baltimore City, who under oath or affirmation subscribes and states in writing that he is financially unable, without undue hardship, to provide for the full payment of an attorney and all other necessary expenses of legal representation."

full payment of an attorney and all other necessary expenses of legal representation," to include "[e]xpenses", *i.e.*, "all costs incident to investigation, other pretrial preparation, trial and appeal of a person accused of a serious crime." Section 2(g). Section 4(a) provides:

> "(a) It shall be the primary duty of the Public Defender to provide legal representation for any indigent defendant eligible for services under this article. Legal representation may be provided by the Public Defender, or, subject to the supervision of the Public Defender, by his deputy, by district public defenders, by assistant public defenders, or by panel attorneys as hereinafter provided for."

Whether a defendant is eligible for OPD supplied representation and services depends on the defendant's need, § 7(a), to be determined by the OPD after investigation, § 7(b), [12] and the value of any representation or services provided becomes a lien on real or personal property of the defendant or to which the defendant acquires an interest or title. Section 7(d).

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[12] Art. 27A, § 7(b) provides:

"(b) The Office of the Public Defender shall make such investigation of the financial status of each defendant at such time or times as the circumstances shall warrant, and in connection therewith the office shall have the authority to require a defendant to execute and deliver such written requests or authorizations as may be necessary under applicable law to provide the office with access to records of public or private sources, otherwise confidential, as may be needed to evaluate eligibility. The office is authorized to obtain information from any public record office of the State or of any subdivision or agency thereof upon request and without payment of any fees ordinarily required by law."

Despite the absence of a rule pertaining to the procedure for obtaining ancillary services comparable to Rule 1-325(b), a fact that the majority readily concedes, but believes to be answered by the severability question, *see* 390 Md. at 379, 889 A.2d at 346, secure in the belief that *Miller* "is instructive on the question of whether the State may condition the receipt of constitutionally mandated services on representation by the O.P.D," the issue it perceives to be presented, 390 Md. at 375, 889 A.2d at 344, the majority concludes that the ancillary services required to be provided by the OPD are non-severable from the representation it is required to provide. 390 Md. at 374-75, 889 A.2d at 343-44. In so doing, it adopts the rationale of the Court of Special Appeals, which it quoted, with approval, as follows:

> "We agree with those states which hold that the dual services provided by the public defender are not severable. The language of Art 27A, § 2, defining indigent as a person unable to 'provide for the full payment of an attorney and all necessary expenses of legal representation,' is a unified enactment and does not contemplate that a defendant be indigent for purposes of 'all necessary expenses' and yet be able to retain private counsel. *See Morton* [*v. Commonwealth,*] 817 S.W.2d [218,] 220 [(Ky.1991)], We adopt Kentucky's position, that 'under this definition and the general tenor of the entire Act, inability to obtain counsel and inability to obtain necessary services go hand in hand.' Thus any funding for the necessary services associated with representation are conditioned upon representation by the Public Defender."

Id. at 373-74, 889 A.2d at 343, quoting *Moore,* 154 Md.App. at 592, 841 A.2d at 39. And, like the intermediate appellate court, the majority holds "that the O.P.D. is not required to pay for expert assistance or other ancillary services if the defendant is not represented by the O.P.D. (or a panel attorney assigned by the O.P.D.)." *Id.* at 374, 889 A.2d at 343.[13] Thus, while acknowledging *Ake's* requirement of a threshold showing of indigence and a demonstration of the defense's significant need for the expert, assuming the latter, it opines that state-funded "expert assistance was available to [Moore] so long as he complied with the procedural requirement that he apply for legal representation through the O.P.D. Imposing this requirement on Moore did not violate his constitutional rights." 390 Md. at 378, 889 A.2d at 346.

The majority is wrong. First, it is important that, in *Miller,* there was a Rule that set out precisely and explicitly the process for obtaining a trial transcript for appeal purposes. That it had its genesis in a statute, predating *Griffin* and the Public Defender statute, pertaining to, and only to, the State's obligation to indigent defendants with respect to trial transcripts, first in capital cases and later, after *Griffin,* in all criminal appeals, and that the requirements were retained after the Public Defender statute was enacted further

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[13] The majority does not expressly address the situation in which the defendant's counsel is acting *pro bono.* On that subject, the Court of Special Appeals observed:

"Additionally, because appellant's counsel was not providing *pro bono* services, we do not express an opinion on whether a defendant with *pro bono* private counsel is entitled to funding for other services associated with representation."

Moore v. State, 154 Md.App. at 592, 841 A.2d at 39 (2004).

underscore its significance. Indeed, because Rule 1-325(b) directly addressed the State's and the OPD's role when a defendant is indigent and, therefore, unable to afford a trial transcript, specifying expressly when the costs will be subsidized, "in any case in which (1) the Public Defender's Office is authorized by these rules or other law to represent a party, (2) the Public Defender has declined representation of the party, and (3) the party is unable by reason of poverty to pay those costs," the *Miller* result fits easily into a statutory construction analysis. Without a comparable statute regulating the State's obligation to provide expert services to indigent defendants, interpreting Art. 27A consistently with *Miller* is, at best, a stretch.

B.

Second, the majority's non-severability holding does not withstand scrutiny. Critical to its soundness is *Morton v. Commonwealth,* 817 S.W.2d 218, 220 (Ky.1991), whose interpretation of Kentucky's public defender statute, and the rationale therefor, we adopted. Similar to this case, the defendant in *Morton,* who also was charged with murder and otherwise was indigent, retained private counsel, paying him a nominal fee of $100. Similar to Maryland's Public Defender statute, Kentucky's, KY. REV. STAT. § 31.100, *et. seq.,* declares the State policy with respect to indigent representation:

> "(1) A needy person who is being detained by a law enforcement officer, on suspicion of having committed, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, or who is accused of having committed a public or status offense or who has been committed to the Department of Juvenile

> Justice or Cabinet for Health and Family Services for having committed a public or status offense as those are defined by KRS 610.010(1)(a), (b), (c), or (d) or 630.020(2) is entitled:
>
> "(a) To be represented by an attorney to the same extent as a person having his own counsel is so entitled; and
>
> "(b) To be provided with the necessary services and facilities of representation including investigation and other preparation. The courts in which the defendant is tried shall waive all costs."

KY. REV. STAT. § 31.110(1)(a) and (b). Also, as in, and similar to, Maryland's statute, it prescribed who was deemed to be indigent. *See* KY. REV. STAT. § 31.100(3)(a), defining "'[n]eedy person' or 'indigent person'" as "(a) A person eighteen (18) years of age or older or emancipated minor under the age of eighteen (18) who, at the time his need is determined, is unable to provide for the payment of an attorney and all other necessary expenses of representation."

To be sure, the Supreme Court of Kentucky construed this statute to set up a unified scheme, in which the services to be provided by the public defender were non-severable:

> "A more difficult question is whether the trial court erred in its determination that a defendant who seeks and obtains the benefits of KRS 31.110(1)(b) may not be represented by retained counsel who declares his intention to continue on a *pro bono* basis. Appellant correctly observes that the statute contains no

> express prohibition against having the Commonwealth provide 'the necessary services and facilities of representation' when the defendant has obtained his own counsel. Be this as it may, in our view, KRS 31.100, *et. seq.*, is a unified enactment which contemplates the necessity of a comprehensive determination whether a defendant qualifies for the benefits provided. For it to be determined that he does, he must be without the independent means to obtain counsel. The statute surely does not contemplate that a defendant would be indigent for purposes of KRS 31.110(1)(b), but still able to hire an attorney. If such were the case, rarely would any defendant step forward to pay investigative costs and other services necessary for his representation. Indeed, in KRS 31.100(3) 'needy person' or 'indigent person' is defined as 'a person who at the time his need is determined is unable to provide for the payment of an attorney and all other necessary expenses of representation.' Under this definition and the general tenor of the entire Act, inability to obtain counsel and inability to obtain necessary services must go hand-in-hand."

Morton, 817 S.W.2d at 220. It did not conclude, however, that the non-severability was absolute or applied in all circumstances.

Immediately following the quoted passage, the court considered another scenario that could arise under the statute and conceded that, in an appropriate case, a different result would obtain:

> "In an unusual case, however, it may be that an indigent defendant can obtain counsel which is truly *pro bono;* counsel who has neither sought nor obtained any fee or the promise thereof for legal services rendered or promised. *In such a circumstance, the dual benefits provided by the Act would indeed be severed.* The defendant would be indigent for purposes of necessary services and facilities, but otherwise be able to provide his own counsel without cost to himself. When such a circumstance produces the severance between ability to obtain counsel and need for other necessary expenses, the statute may be interpreted to permit the trial court to grant indigency status for purposes of KRS 31.110(1)(b) only."

817 S.W.2d at 220-221 (emphasis added). Thus, although *Morton* does support the majority's holding, it also contradicts it. Because it recognizes that there may be circumstances, such as representation by a *pro bono* attorney, under which a defendant could obtain State-funded expert services without the involvement of the public defender, it does not support the notion, advanced by the majority, that the OPD is, and always must be, the gatekeeper of State funds and defense attorney competence. In fact, *Morton* undermines the viability of that concept under this statutory scheme.

The gatekeeper function attributed to the OPD is not supported by the statute establishing it. The majority is correct, *see* 390 Md. at 375-76, 889 A.2d at 344, indeed, it is undisputed, that Maryland has established a State-wide public defender system to discharge its responsibility to

provide constitutionally guaranteed "legal representation, investigative services, and expert assistance" to indigent defendants. Art. 27A, § 1 does place the duty on the OPD to "administer and assure enforcement of the provision[s] of [Article 27A], in accordance with its terms." Nothing in Art. 27A, however, explicitly, or inferentially, requires that services funded by the State may only be obtained when the OPD either represents the defendant needing them or supervises the attorney representing that defendant. I do not read the words, "administer and assure enforcement of the provision of [Article 27A], in accordance with its terms," as broadly as the majority apparently does. Nor do I believe that the result reached by the majority can be justified by the statement of the goal, directed to the State itself, "to provide for the realization of the constitutional guarantees of counsel."[14]

Moreover, I disagree that legal representation and the ancillary services required for an adequate defense are non-severable. In this belief, I am far from alone. Courts from other jurisdictions have held that a defendant is entitled to State-funded expert services in circumstances comparable to the petitioner's, as well as when a defendant is being

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[14] Under the majority's theory, the OPD either must represent the indigent defendant or supervise the appointed attorney in some manner so as to prevent abuse of State resources. While I recognize that the OPD has a very limited budget, it strikes me as unusual that the decisions made as to how properly to allocate State resources should be the same decisions made by the representing attorney. In the strange case where two defendants are on trial with opposing theories and one defendant is assigned to an outside conflicts attorney, I find it paradoxical that that conflicts attorney would be somewhat under the control of the OPD should he need certain expert services. Perhaps the gatekeeping function of the OPD should be more in the nature of determining indigency and allocating the funds for the experts and other services, not direct supervision or control.

represented *pro bono*. *See, e.g., Ex parte Sanders,* 612 So.2d 1199, 1201 (Ala.1993) (holding indigent defendant has right to public funds to hire expert although represented by counsel retained by family); *Dubose v. State,* 662 So.2d 1189, 1191 (Ala.1995) (following *Sanders*); *People v. Worthy,* 109 Cal.App.3d 514, 167 Cal.Rptr. 402, 406 (1980) (concluding that, upon a proper showing of necessity, trial court must provide an indigent defendant expert services, without regard to whether his counsel is appointed or *pro bono*); *People v. Evans,* 271 Ill.App.3d 495, 208 Ill.Dec. 42, 648 N.E.2d 964, 969 (1995) (concluding that indigent defendant entitled to expert witness funding although represented by private law firm where services provided on *pro bono* basis); *English v. Missildine,* 311 N.W.2d 292, 293-94 (Iowa 1981) (holding Sixth Amendment authority for furnishing investigative services at public expense without regard to whether indigent represented by private counsel); *State v. Jones,* 707 So.2d 975, 977-78 (La.1998) (holding, although indigent defendant was represented by counsel retained by defendant's father, he was eligible for state-funded necessary services); *State v. Seifert,* 423 N.W.2d 368, 371 (Minn.1988) (holding that an indigent *pro se* criminal appellant must be given access to a trial transcript on a limited basis for the purpose of perfecting his appeal, even though the public defender is not acting as his appellate counsel); *State v. Huchting,* 927 S.W.2d 411, 419 (Mo.Ct.App.1996) (noting retention of private counsel does not cause a defendant to forfeit his eligibility for state assistance in paying for expert witness or investigative expenses); *State v. Manning,* 234 N.J.Super. 147, 560 A.2d 693, 698-99 (1989) (holding indigent defendant could not be denied state-funded expert services because he was represented by private counsel, whether counsel was *pro bono* or paid by third party); *Widdis v. Second Jud. Dist. Ct.,* 114 Nev. 1224, 968 P.2d 1165, 1168 (Nev.1998) (holding criminal defendant with private counsel constitutionally entitled to reasonable defense services at

public expense based on defendant's showing of indigency and need for the services); *State v. Burns,* 4 P.3d 795, 800-02 (Utah 2000) (holding statutory right to publicly funded expert assistance under statute could not be conditioned upon accepting court-appointed counsel in lieu of private counsel retained at father's expense); *State ex rel. Rojas v. Wilkes,* 193 W.Va. 206, 455 S.E.2d 575, 577 (1995) (holding that funds with which defendant's family retained private counsel irrelevant to defendant's right as indigent to have necessary expert assistance provided at state's expense).

Because it involved private counsel, *albeit* provided by a third person and not by the defendant, *English v. Missildine* is on point and instructive. There, the question presented was whether an indigent defendant, charged with theft, had the right to employ an expert and take depositions, the necessity for which was not at issue, at public expense when he was represented by counsel supplied by his mother. An Iowa statute authorizing fees for court-appointed attorneys covered such expenses. Iowa Code Ann. § 815.7 (2004).[15]

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[15] IOWA CODE ANN. § 8.517 provides:

"An attorney who has not entered into a contract authorized under section 13B.4 and who is appointed by the court to represent any person charged with a crime in this state, seeking postconviction relief, against whom a contempt action is pending, appealing a criminal conviction, appealing a denial of postconviction relief, or subject to a proceeding under section 811.1A or chapter 229A or 812, or to serve as counsel for any person or guardian ad litem for any child in juvenile court, shall be entitled to reasonable compensation and expenses. For appointments made on or after July 1, 1999, the reasonable compensation shall be calculated on the basis of sixty dollars per hour for class 'A' felonies, fifty-five dollars per hour for class 'B' felonies, and fifty dollars per hour for all other cases. The expenses shall include any sums as are necessary for investigations in the interest of justice, and the cost of obtaining the transcript of the trial record and briefs if an appeal is filed. The attorney need not follow the case into another county or into the appellate court unless

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Conceding the defendant's entitlement were he represented by a court-appointed attorney, the State opposed the defendant's petition because he was represented by private counsel. 311 N.W.2d at 293. In support, it made arguments reminiscent of the arguments made, and adopted, in this case: the defendant's only remedy was to accept court appointed or assigned counsel; refusing State-funding of the services did not constitute a constitutional violation since they could be obtained through an alternative State-sanctioned procedure, 311 N.W.2d at 294, and to allow funding in cases other than those in which counsel was appointed would be to give an indigent defendant a right he does not have, to retain counsel of choice. *Id.*

The Supreme Court of Iowa sided with the indigent defendant. Concluding that "authority for the services requested by [the indigent defendant] exists under his sixth amendment right to effective representation of counsel," *id.* at 293, and acknowledging that third party funded representation does not by itself undermine a defendant's indigency, citing *Schmidt v. Uhlenhopp,* 258 Iowa 771, 140 N.W.2d 118 (1966), it held:

> "For indigents the right to effective counsel includes the right to public payment for reasonably necessary investigative services ... [t]he Constitution does not limit this right to defendants represented by appointed or assigned counsel. The determinative question

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so directed by the court. If the attorney follows the case into another county or into the appellate court, the attorney shall be entitled to compensation as provided in this section. Only one attorney fee shall be so awarded in any one case except that in class 'A' felony cases, two may be authorized."

> is the defendant's indigency. When his indigent status is established the 'defendant is constitutionally entitled to those defense services for which he demonstrates a need.'"

311 N.W.2d at 293-294, citing *People v. Worthy*, 109 Cal.App.3d 514, 520, 167 Cal.Rptr. 402, 406 (1980). The court responded to, and rejected, the State's constitutional argument, reasoning:

> "The State's constitutional argument begs the question. If, as we have held, the sixth amendment provides authority for furnishing investigative services to indigents at public expense without regard to whether the indigent is represented by counsel at public expense, the fact that indigents represented by counsel at public expense have the same right is not material. It would be strange if the Constitution required the government to furnish both counsel and investigative services in cases where the indigent needs and requests public payment for only investigative services. The State's theory would impose an unreasonable and unnecessary additional burden on the public treasury.
>
> "Moreover, we do not share the State's concern about an indigent's right to be represented by counsel of his choice when the attorney is not paid at public expense. We have recognized that an indigent does not have this right of choice when counsel is paid from public funds .... However, no reason exists for depriving an indigent of the same right of choice as a person of means when the

> indigent is able to obtain private counsel without public expense."

311 N.W.2d at 294 (citation omitted).

State v. Burns, supra, is similarly instructive. In that case, the indigent defendants were represented by private counsel, paid for by a family member. 4 P.3d at 800-802. Being unable to afford the cost of a concededly necessary medical expert witness, they sought to have that expense paid by the State. Id. at 796-97. Denying the request, the trial court opined: "the [defendants] would have to make a decision as to whether to retain their counsel, paid for by [a defendant's] father, or if they were ultimately found to be indigent so as to qualify for funds for expert witnesses, the court would appoint L[egal] D[efender] A[ssociation] counsel and then the funds for expert assistance would be available." 4 P.3d at 797. The defendants appealed, arguing that it was error for the trial court to force that choice. 4 P.3d at 799. To resolve the issue, the Supreme Court of Utah interpreted, and harmonized, two provisions of Utah Code Ann. § § 77-32-101 to -704 (1999), the Indigent Defense Act ("Act"): § 77-32-301, [16] outlining the minimum standards required for

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[16] UTAH CODE ANN. § 77-32-301 (Supp.1999) provided:

"The following are minimum standards to be provided by each county, city and town for the defense of indigent persons in criminal cases in the courts and various administrative bodies of the state:
"(1) Provide counsel for every indigent person who faces the substantial probability of the deprivation of his liberty;
"(2) Afford timely representation by competent legal counsel;
"(3) Provide the investigatory and other facilities necessary for a complete defense;
"(4) Assure undivided loyalty of defense counsel to the client; and
"(5) Include the taking of a first appeal of right and the prosecuting of other remedies before or after a conviction, considered by the defending

(cont'd)

indigent defense, and § 77-32-6 (1990),[17] designating the options for meeting those standards. It concluded:

> "[T]his section cannot be read to mandate the packaging of indigent assistance with LDA representation. To suggest, as the State does, that only those indigents represented by LDA are eligible for the minimum services would be a direct contradiction of the plain meaning of section 77-32-1 as well as the legislative purpose of providing indigents with the basic tools of defense. In fact, contrary to its argument, the State indicated at oral argument that an indigent defendant proceeding *pro se* who has declined standby counsel from the LDA would be able to acquire funding for expert assistance.
>
> "Furthermore, rule 15 of the Utah Rules of Criminal Procedure provides that '[u]pon showing that a defendant is financially unable to pay the fees of an expert whose services are

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(cont'd from previous page)
counsel to be in the interest of justice except for other and subsequent discretionary appeals or discretionary writ proceedings."

[17] UTAH CODE ANN. § 77-32-6 (1990), presently codified without substantive change, at § 77-32-306 (Supp.1999), provided:

"[G]overning bodies of the counties, cities and towns shall either:
"(1) Authorize the court to provide the services prescribed by this chapter by appointing a qualified attorney in each case and awarding him reasonable compensation and expenses to be paid by the appropriate governing body; or

"(2) Arrange to provide those services through non-profit legal aid or other associations."

> necessary for adequate defense, the witness fee shall be paid as if he were called on behalf of the prosecution.' There is no indication in this rule that a defendant must be represented by LDA to qualify for this assistance. Instead, the only prerequisites for eligibility are financial inability to pay and necessity for an adequate defense.
>
> "It follows, therefore, that the only requirements for receiving public assistance for expert witnesses are proof of necessity and establishment of indigence. It is up to the court, not the LDA, to determine indigency and therefore eligibility. While who is paying for a defendant's attorney may be a factor in the determination of indigency, it is not the determinative factor, and in this case, the court did not allow Burns to have her hearing on indigence without condition of LDA representation. Therefore, the trial court erred in failing to determine whether Burns was indigent and in holding instead that LDA representation was a prerequisite to providing the statutorily required minimum standards for an indigent defense. As a result, even though Burns's father was paying for her defense attorney, Burns was entitled to a hearing for a determination of whether she was indigent without the condition that she accept LDA counsel."

4 P.3d at 801-802.

To like effect, *see In re: Cannady, supra,* 126 N.J. 486, 600 A.2d 459, 462. In that case, the court rejected the argument that the New Jersey Public Defender Act precluded the

funding of ancillary services for indigent defendants represented by private counsel, holding instead:

> "New Jersey's policy is to provide counsel for all indigent defendants, not just for indigents represented by the OPD. The Act's language states that eligibility for OPD services includes not just a defendant's inability to hire private counsel but also a defendant's ability to pay for all other necessary expenses of representation. Nowhere in the Act is there a requirement that a defendant obtain legal services from the OPD before he or she may obtain ancillary services from it. The Legislature intended that a defendant's right to obtain necessary ancillary services for his or her defense depends on the defendant's indigence and not on whether the defendant is represented by outside counsel."

Id. The court, nevertheless, recognizing the need for and "[i]n order to maintain a unitary, centralized Public Defender System," developed a framework to insure that the OPD maintains the requisite control over services provided to defendants represented by outside counsel, the same as it does over services it provides to its own clients. *Id.* at 462-464. In particular, it made clear that "[i]f, [applying the factors it identified], the OPD decides to provide services for a defendant, it is the OPD who shall determine how much money it should expend on such services." *Id.* at 464, citing the Public Defender Statute and noting that it "does not require that it write a blank check for privately-represented defendants." *See also Ex Parte Sanders,* 612 So.2d at 1201 (holding, in a case where private counsel was secured for an indigent man by a family member, that "[t]he simple fact that the defendant's family, with no legal duty to do so, retained

counsel for the defendant, does not bar the defendant from obtaining the funds for expert assistance when the defendant shows that the expert assistance is necessary").

C.

When explaining its application of the *Miller* holding to the case *sub judice,* the majority states that defendants properly may be put to the choice of counsel and the ancillary services required to be supplied at State expense to ensure an effective defense, because the constitution does not bar the State of Maryland from doing so. 390 Md. at 379, 889 A.2d at 346. I do not agree.

The Sixth Amendment of the United States Constitution[18] guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence," *Wheat v. United States,* 486 U.S. 153, 158, 108 S.Ct. 1692, 1694, 100 L.Ed.2d 140, 148 (1988), the purpose of which is to ensure fairness in the criminal justice process. *United States v. Morrison,* 449 U.S. 361, 364, 101 S.Ct. 665, 667, 66 L.Ed.2d 564, 567 (1981). Pursuant to that Amendment, the right to counsel is secured by the appointment of counsel, as necessary. *Gideon v. Wainwright,* 372 U.S. 335, 344, 83 S.Ct. 792, 796, 9 L.Ed.2d 799, 805 (1963).

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[18] U.S. CONST. amend. VI provides in part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ... and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Inherent in the constitutional right to counsel is the right to be represented by counsel of choice. *Wheat,* 486 U.S. at 159, 108 S.Ct. at 1697, 100 L.Ed.2d at 148-149. That right of choice is not limited to persons with means. While, to be sure, an indigent defendant's right of choice is significantly restricted, *Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 624, 109 S.Ct. 2646, 2652, 105 L.Ed.2d 528, 541 (1989) ("The Amendment guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts."); *Wheat,* 486 U.S. at 159, 108 S.Ct. at 1697, 100 L.Ed.2d at 149 ("[A] defendant may not insist on representation by an attorney he cannot afford."); *Fowlkes v. State,* 311 Md. 586, 605, 536 A.2d 1149, 1159 (1988) ("for indigent defendants unable to retain private counsel, the right to counsel is but a right to effective legal representation; it is not a right to representation by any particular attorney"); *State v. DeLuna,* 110 Ariz. 497, 520 P.2d 1121, 1124 (1974); *State v. Harper,* 381 So.2d 468, 470 (La.1980), the fact of indigency is not dispositive; "[t]he Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." *Caplin & Drysdale, Chartered v. United States,* 491 U.S. at 624-625, 109 S.Ct. at 2652, 105 L.Ed.2d at 541.

The Supreme Court has recognized that the Sixth Amendment right to counsel of choice, in certain situations, is qualified, that "the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat,* 486 U.S. at 159, 108 S.Ct. at 1697, 100 L.Ed.2d at 148. *See also*

Morris v. Slappy, 461 U.S. 1, 13-14, 103 S.Ct. 1610, 1617-1618, 75 L.Ed.2d 610, 620-621 (1983). Thus,

> "The Sixth Amendment right to choose one's own counsel is circumscribed in several important respects. Regardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients (other than himself) in court. Similarly, a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant. Nor may a defendant insist on the counsel of an attorney who has a previous or ongoing relationship with an opposing party, even when the opposing party is the Government."

Wheat, 486 U.S. at 159, 108 S.Ct. at 1697, 100 L.Ed.2d at 148-149. Moreover, notwithstanding that the right to counsel ordinarily encompasses a right to retain counsel of one's choice, the latter right does not trump, and will not be permitted to frustrate, the orderly administration of criminal justice. *See Maynard v. Meachum,* 545 F.2d 273, 278 (1st Cir.1976); *Kates v. Nelson,* 435 F.2d 1085, 1088-1089 (9th Cir.1970); *United States ex rel. Davis v. McMann,* 386 F.2d 611, 618-619 (2d Cir.1967), *cert. denied,* 390 U.S. 958, 88 S.Ct. 1049, 19 L.Ed.2d 1153 (1968); *United States v. Bentvena,* 319 F.2d 916, 936 (2d Cir.1963), *cert. denied,* 375 U.S. 940, 84 S.Ct. 345, 11 L.Ed.2d 271 (1963); *State v. Harper,* 381 So.2d at 470-471; *Rahhal v. State,* 52 Wis.2d 144, 187 N.W.2d 800, 803 (1971).

Wheat is exemplary of the latter restriction. There, two court days before his trial was to commence, Mark Wheat ("Wheat"), one of the many co-defendants on trial for charges arising out of an alleged broad-based drug ring,

moved to substitute the counsel for two of his co-defendants as his counsel as well. In support of his motion, he asserted his Sixth Amendment right to the counsel of his choice, and his willingness, as well as that of the affected co-defendants, to waive the right to conflict-free counsel. The trial court denied the substitution motion, finding irreconcilable and unwaiveable conflicts of interest for counsel, created by the likelihood that Wheat would be called to testify at any subsequent trial of one of his co-defendants and that the other would testify at Wheat's trial. In affirming the trial court, the Supreme Court noted the timing of the motion, just two days before trial, and emphasized the complexity of the drug distribution scheme alleged and the potential seriousness of the attorney's conflict, involving, as it did, three alleged co-conspirators of varying stature in the distribution scheme. The Court concluded:

> "The District Court must recognize a presumption in favor of petitioner's counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict."

Wheat, 486 U.S. at 164, 108 S.Ct. at 1700, 100 L.Ed.2d at 152.

Certainly, the petitioner's insistence on counsel of choice, which, by the way, does not burden the State's resources, does not implicate any of the recognized qualifications on the right to choice. Clearly, it does not come close to frustrating the orderly administration of the criminal justice system.

D.

The majority holds, as we have seen, "that the O.P.D. is not required to pay for expert assistance or other ancillary services if the defendant is not represented by the O.P.D. (or a panel attorney assigned by the O.P.D.)" 390 Md. at 374, 889 A.2d at 343. Amplifying that holding, it explains:

> "The operative part of the statutory definition of 'indigent' contained in Art. 27A is that the defendant is financially unable, without undue hardship, to provide for the *full payment of an attorney* and all other necessary expenses of legal representation. The services provided by the O.P.D. are not severable. In order for the defendant to qualify for the benefits provided under the [Public Defender statute] and thereby require the [Office of the Public Defender] to pay for services, the defendant must be without independent means to obtain counsel."

Id.

As I interpret this holding, to qualify for State-funded services, a defendant must be represented by the OPD or one of its panel attorneys, but to qualify for OPD representation, he or she "must be without independent means to obtain counsel." Thus, a defendant, though now indigent, who retained counsel when able to do so, would not qualify because, already having counsel, he or she would not be without independent means to obtain counsel. Similarly, a defendant who was always indigent, but had family who retained counsel for him or her or who was able to obtain *pro*

bono counsel,[19] would not qualify because he or she was not

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[19] In *State v. Brown,* 135 N.M. 291, 87 P.3d 1073, 1086 (Ct.App.2004) (Vigil, J., dissenting), addressing an issue much like that which this Court is confronting, Judge Vigil advanced, as one ground for his dissent, the strong policy of New Mexico to encourage *pro bono* services. That policy is reflected in the Preamble to the N.M. Rules of Professional Conduct and in its Rule 16-601, requiring New Mexico attorneys to aspire to render at least 50 hours of *pro bono* public legal services per year. Therefore, Judge Vigil admonished the majority, "we should advance that public policy by encouraging and supporting, not discouraging *pro bono* services." Moreover, Judge Virgil pointed out a necessary consequence of such discouragement:

> "[T]he majority opinion results in the unnecessary expenditure of public funds. While the majority recognizes that the Department has a 'limited budget' and an 'obligation to administer its resources so that all of its clients realized [sic] their constitutional rights to counsel and ancillary services', [] its reasoning will result in higher, unnecessary expenditures by the State. First, it results in a greater client base for the Department since it discourages *pro bono* representation. Second, instead of allowing the State to pay only limited expenses of Brown's defense, the majority requires the State to pay for all of them, including the most expensive component, counsel. The majority holding guarantees a need to spend more public funds, instead of encouraging *pro bono* representation with the potential to conserve state funds. It therefore results in an unreasonable and unnecessary burden on the public treasury[,]"

id., concluding:

> "Requiring indigent defendants to abandon donated legal services and requiring them to accept representation by public defenders as a condition of receiving other basic tools of an adequate defense will only further increase these burdens."

Brown, 87 P.3d at 1086-1087 (Vigil, J., dissenting).

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Like New Mexico, Maryland has a strong policy of encouraging attorneys to provide *pro bono* representation to indigent persons, as a public service and as a professional responsibility. Like New Mexico, the Preamble to our Rules of Professional Responsibility, *see* Maryland Rule 16-812, recognizes a lawyer's responsibilities in that regard. It provides, as pertinent:

> "A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest."

So, too, is that policy reflected in our *pro bono* Rule, Rule 6.1, and because of the requirement, contained in Rule 16-903, that all attorneys annually report their *pro bono* service, it perhaps is stronger than the New Mexico public policy.

Also relevant on this issue is what was said in *People v. Cardenas,* 62 P.3d 621, 625 (Colo.2002) (Hobbs, J., dissenting).

"Allowing the state to pay costs, in conjunction with *pro bono* attorney time, as a matter of economic reality would encourage attorney participation in *pro bono* service. *Pro bono* representation envisions providing legal services without compensation, but not necessarily at high individual expense to the attorney. When an attorney provides *pro bono* service, she demonstrates a commitment to the public interest. When private counsel agrees to represent an indigent defendant, the burden and financial cost is taken off the state public defender's office. Allowing indigent defendants to receive support services, at the state's expense, even when they are represented by private counsel, encourages counsel to provide the service and saves the state the cost of attorney's fees."

represented by the OPD or a panel attorney. The majority rejoins that the defendant is not without recourse, he or she could accept OPD representation, with which comes the ancillary services, and that only requires either that the defendant forego the counsel of choice, whether retained when able, supplied by a third party or provided *pro bono,* who is willing and able to continue the representation and with whose services the defendant is satisfied, or that counsel become a panel attorney subject to the supervision of the OPD.[20]

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[20] I recognize and acknowledge that the budget of the Office of the Public Defender is overburdened and, so, there can be no dispute that the OPD has a role to play in the decision to pay for ancillary services. As Maryland's is a unitary, centralized Public Defender System, I do not doubt the value of the OPD maintaining appropriate control over services provided to defendants represented by outside counsel, preferably to the same extent as it exercises control over the expenditure of funds for services it provides to its own clients. Perhaps, as was done in *In re Cannady,* 126 N.J. 486, 600 A.2d 459, 462 (1991), a framework needs to be developed to insure that the OPD occupies that position and discharges that responsibility. Such a framework would recognize that the indigent defendant does not have the right, at the State's expense, to select the most expensive expert. *See Ross v. Moffitt,* 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974). It would also provide a process for the defendant to establish eligibility, *i.e.* indigency, and also the need for the services sought.

Courts that have been presented with the issue have held that permitting defendants represented by outside attorneys to request State funds for ancillary services would not unduly burden the system. In *Chao v. State,* 780 A.2d 1060, 1072 (Del.2001), rejecting the argument that such a regime would create a judicial "hodgepodge" in which the claims for services would overburden the system and the Office of the Public Defender would lose control over its budget, the Delaware Supreme Court held that (1) the determination of indigency was a routine practice, (2) trial courts were routinely asked whether certain investigative services were "necessary to a defense," and (3) public funding would only be available in limited circumstances under trial court discretion, where the court deemed it unnecessary for the private counsel to withdraw in favor of the public defender.

(cont'd)

This scheme infringes on the indigent defendant's Sixth Amendment rights to counsel of choice, for the reasons discussed. In addition, it uses the wrong test of eligibility for ancillary services; rather than indigency and necessity, the factors identified and addressed in *Ake,* the majority predicates entitlement to ancillary services on the status of the attorney representing the indigent defendant. At least as important, the majority's interpretation of Article 27A produces anomalous and absurd results. Delaware, in *Bailey v. State,* 438 A.2d 877, 878 (Del.1981), held that "a defendant who is indigent but who manages (through the assistance of others) to retain counsel is not entitled to the services of a Public Defender appointee nor to funding from the Public Defender's appropriation to employ an

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The Vermont Supreme Court, in response to the State's concern that allowing necessary services to be State-funded would lead to an "unfettered" reimbursement of expenses incurred by defendants, responded:

> "That is simply not the case .... To receive reimbursement, a defendant must show that a requested service is necessary to mount an adequate defense .... Anyone who has ever been responsible for a budget, whether for a family, a business, or a large state agency, can understand the frustration of bearing financial responsibility for expenses that someone else controls. Nonetheless, we cannot see that this system poses an unmanageable problem for the Defender General. Indeed, the primary expense of that office-the number of needy defendants requiring representation-is entirely out of the control of the Defender General. And even in cases where the defendant is represented by a public defender, the court may order the Defender General to pay for a necessary service."

State v. Handson, 166 Vt. 85, 689 A.2d 1081, 1084 (1996).

investigator as part of his defense effort." Nevertheless, it recognized an illogical aspect to its holding: "an indigent defendant who relieves the public of the burden of representing him cannot secure investigative assistance which he can get (under the Public Defender Act) if he places the entire burden on the public." *Id.* In *State v. Wool,* 162 Vt. 342, 648 A.2d 655, 660 (1994), the Supreme Court of Vermont held that, under its Public Defender statute, "an individual may qualify as 'needy' despite the fact that the person can afford to pay for the services of or can otherwise retain an attorney, but cannot afford other necessary representation expenses ... [and] that [that statute] must be construed to entitle needy persons who are represented, either by an attorney or themselves, to public funding for other necessary expenses." That interpretation, it concluded, "fosters sound fiscal and public policy, because a defendant would not be required to forego *pro bono* counsel or self-representation simply to obtain associated services at the public expense." *Id.,* citing *State v. Manning,* 234 N.J.Super. 147, 560 A.2d 693, 699 (1989). *See State v. Handson,* 166 Vt. 85, 689 A.2d 1081, 1083 (1996), in which the court, in assessing the cost of necessary expenses in connection with the defendant's *pro se* defense against the State's public defender, observed: "[b]y waiving the right to a public defender, defendant relieved the Defender General of a substantial financial obligation." *See* also *Coyazo v. State,* 120 N.M. 47, 897 P.2d 234, 240 (1995) (commenting on the advantageous impact maintenance of a cadre of private attorneys has on the public defender office-"lessens the state's requirement for full time employees in the Public Defender Department").

The high courts of Iowa and Minnesota agree. We have already seen that the Iowa Supreme Court has held, in *English v. Missildine,* 311 N.W.2d at 294, that "the sixth amendment provides authority for furnishing investigative

services to indigents at public expense without regard to whether the indigent is represented by counsel at public expense." The court has also observed:

> "It would be strange if the Constitution required the government to furnish both counsel and investigative services in cases where the indigent needs and requests public payment for only investigative services. The State's theory would impose an unreasonable and unnecessary additional burden on the public treasury."

Id.

The Supreme Court of Minnesota made essentially the same point in *State v. Pederson,* 600 N.W.2d 451, 454 (Minn.1999), a case in which the court held an indigent defendant entitled to a trial transcript, despite the fact that he was represented by private appellate counsel. Rejecting the state's argument that legal representation and ancillary services were a "package deal," the court stated:

> "We acknowledge the concerns of the public defender and the dissent, but conclude that, like any other indigent criminal appellant whom the public defender offers to represent, Pederson is entitled to both the services of a public defender and a trial transcript at public expense.... We see no reason to force the state to pay for a service the indigent criminal appellant does not wish to use. Accordingly, Pederson has the right to refuse the services of the public defender, yet receive a trial transcript at public expense."

Pederson, 600 N.W.2d at 454.

For the preceding reasons, I dissent.

APPENDIX B

FREDERICK JAMES MOORE	*	In the
	*	Court of Appeals
v.	*	of Maryland
	*	No. 28
STATE OF MARYLAND	*	September Term, 2004

ORDER

The Court having considered the Petitioner's Motion for Reconsideration filed in the above-captioned case, it is this 3rd day of February, 2006,

ORDERED, by the Court of Appeals of Maryland, that the motion be, and it is hereby, DENIED.

/s/ ROBERT M. BELL
Chief Judge

FREDERICK JAMES MOORE	*	IN THE
	*	COURT OF
	*	APPEALS
v.	*	OF MARYLAND
	*	No. 28
STATE OF MARYLAND	*	September Term,
	*	2004

MANDATE

TO THE HONORABLE THE JUDGES OF THE
COURT OF SPECIAL APPEALS OF MARYLAND:

WHEREAS the case of Frederick James Moore v. State of Maryland wherein the judgment of the said Court of Special Appeals was duly entered on January 28, 2004, as appears from the transcript of the record of the said Court of Special Appeals which was brought into the Court of Appeals by virtue of a writ of certiorari dated June 11, 2004, and

WHEREAS in the September Term, 2004, the said cause came on to be heard by the Court of Appeals of Maryland;

ON CONSIDERATION WHEREOF, it was ordered and adjudged on December 14, 2005, by the Court of Appeals of Maryland, that the judgment of the Court of Special Appeals is affirmed. Costs to be paid by Petitioner.

NOW, THEREFORE, THIS CAUSE IS REMANDED to you in order that such proceedings may be had in the cause in conformity with the judgment of this Court as accorded with right and justice, and the Constitution and laws of Maryland, the said writ notwithstanding.

WITNESS The Honorable Robert M. Bell, Chief Judge of the Court of Appeals of Maryland, this third day of February, 2006.

/s/

Clerk
Court of Appeals of Maryland

Filing Fee – Cross-Petition	$ 50.00
Filing Fee – Petition	$ 50.00
Filing Fee – Court of Special Appeals	$ 50.00
Petitioner/X-Respondent's brief	$ 326.40
Cross-Respondent's brief	$ 216.00
Record Extract	$1104.00
Appearance fee – Petitioner/X-Respondent	$ 10.00
Respondent/Cross-Petitioner's brief	$ 331.20
Appearance fee – Respondent/X-Petitioner	$ 10.00
Extra copies of brief of respondent/ X-petitioner (1)	$ 16.56
Extra copies of brief of petitioner (4)	$ 65.28
Extra copies of petitioner's reply brief (6)	$ 64.80
	$2294.24
Motion for Reconsideration	$ 50.00
	$2344.24

COSTS SHOWN ON MANDATE ARE TO BE SETTLED BETWEEN COUNSEL AND NOT THROUGH THIS OFFICE.

APPENDIX C

Court of Special Appeals of Maryland.
Frederick James MOORE
v.
STATE of Maryland.
No. 1394, Sept. Term, 2002.

Jan. 28, 2004.

Argued before DAVIS, JAMES R. EYLER, and WILLIAM W. WENNER (retired, specially assigned), JJ.

DAVIS, J.

Appellant Frederick James Moore was charged with first degree murder by an indictment filed on January 4, 2001 in the Circuit Court for Howard County. On January 16, 2001, private counsel entered his appearance on behalf of appellant. Subsequently, the State filed a notice to introduce Deoxyribonucleic Acid (DNA) evidence on March 7, 2001. Following discovery of the DNA evidence, appellant filed a motion for financial aid on November 20, 2001, requesting that the Office of the Public Defender (Public Defender) or Howard County pay for the services of a DNA defense expert. At a hearing held on January 14, 2002, the Public Defender announced that it refused appellant's request citing that it was the policy of the Public Defender not to provide funds for experts in private counsel cases. Also at the hearing, Judge Raymond J. Kane, Jr., denied appellant's request for funding, stating that the court did not have any available funds. Appellant was subsequently tried by a jury in a five-day trial beginning on January 28 and ending on February 1, 2002. The jury convicted appellant of first degree murder and he was sentenced to life imprisonment on

August 21, 2002.

Appellant filed his timely appeal on September 5, 2002, presenting three questions for our review, which we rephrase and combine into two questions as follows:

I. Did the trial court err by denying appellant's motion requesting funding for a DNA defense expert on the grounds of indigency when appellant had retained and financed private counsel?[32]

II. Did the trial court err by excluding other crimes evidence of a separately tried and convicted co-defendant?

We answer appellant's questions in the negative and therefore affirm the judgment of the circuit court.

FACTUAL BACKGROUND

On the night of November 2, 2002, appellant, Scott Brill, and a fourteen-year-old girl named Ashley Nicole Mason arrived at the home of Martise Stewart. While at Stewart's residence, an argument erupted among the three-with appellant and Brill in disagreement with Mason. The argument eventually became violent when Brill punched Mason in the face. Soon after the argument, appellant, Brill, and Mason left Stewart's residence in a small car, with appellant driving and Brill and

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[32] In his brief, appellant phrases his first two questions as "[w]hether the [c]ircuit [c]ourt's and Public Defender's refusal ..." The inclusion of the Public Defender implies that the scope of our review includes the actions of the Public Defender. As explained, *infra*, however, we do not review the actions of the Public Defender, but only the actions of the lower court. Therefore, the Public Defender has been omitted from the questions presented.

Mason in the back seat. Several hours later, appellant and Brill returned to Stewart's residence. Appellant indicated to several individuals that he and Brill had killed Mason using a "buck knife" and put her body behind a Pizza Hut Restaurant. Also, appellant had blood smeared on his boots and legs and Brill had multiple lacerations on his arms.

The body of Mason was discovered on November 3, 2000, in a wooded area behind a Pizza Hut Restaurant, located in Howard County, Maryland. Police recovered several items at or near the crime scene and collected various evidentiary samples from the body of Mason. The State contracted with Cellmark Diagnostics, Inc. (Cellmark) to perform a DNA analysis of the collected items and samples and compare the results with the DNA profiles of both appellant and Brill. Cellmark concluded that Moore's DNA profile was present on some of the items and samples collected.

Appellant was indicted for the murder of Mason on January 4, 2001. Appellant did not apply to the Public Defender but instead privately retained Sheldon C. Mazelis, Esquire, to represent him. Mazelis entered his appearance on appellant's behalf on January 16, 2001. Appellant stated that he was able to pay for private counsel only because he recently acquired funds for physical injuries he received in a motor vehicle accident.

On March 7, 2001, the State filed its notice of intention to introduce DNA profile evidence at trial. Appellant requested and was eventually provided with the State's DNA materials. After receiving the materials, appellant paid $1,000 to a DNA expert for the purpose of analyzing Cellmark's results. The DNA expert provided a preliminary opinion regarding the testing methods used by Cellmark, but would not testify at trial without additional payment. Unable to pay for further services from the expert, appellant filed a motion on

November 20, 2001, requesting that the Public Defender or Howard County provide financial aid for the testimony of his DNA expert. Although he still retained the services of private counsel, appellant claimed to be indigent. A hearing on the motion was held on January 14, 2002, at which appellant stated he was indigent but made no factual showing establishing his indigency. In response to appellant's motion, a member of the Public Defender's Office explained:

> Upon discussion with [the State's Attorney] and upon reviewing the pleadings, I telephoned Mr. Mazelis and gave him the bad news, which is that the policy of the [Public Defender] is that we do not provide funds for experts in private counsel cases. That was my understanding of the policy. To confirm that, I telephoned the Deputy Public Defender.... That is the policy. They are not willing to make an exception.

The trial judge reviewed the budget of the court and concluded that it did not have available funds. As a result, the trial judge denied appellant's request by refusing to provide funding for his expert's testimony and by refusing to order the Public Defender to provide the funding. Appellant was subsequently tried without the testimony of his retained expert and convicted by a jury on February 1, 2002. On August 21, 2002, he was sentenced to life imprisonment. Appellant filed this appeal on September 5, 2002.

LEGAL ANALYSIS

Appellate Review of Policy of Public Defender

In his questions presented, appellant implies that we have authority to directly review the actions of the Public

Defender. Appellant avers that the refusal of the Public Defender to provide a DNA expert violated his constitutional rights and the Public Defender Statute found in Maryland Code (1957, Repl.1997), art. 27A, resulting in an error that is reviewable in this appeal. Additionally, in his brief, appellant explicitly argues that "[t]he Public Defender's policy to deny aid to an indigent defendant is reviewable for abuse of discretion on direct appeal." He is wrong.

Our review focuses on the actions of the trial court and whether the court erred. "Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the *trial court.*" Md. Rule 8-131(a) (emphasis added). "The right of appeal exists from a final judgment entered by a *court* in the exercise of original, special, limited, statutory jurisdiction." Md.Code (2002 Repl. Vol), Cts. & Jud. Proc. (C.J.), § 12-301 (emphasis added). The Court of Appeals has stated:

> [T]he Constitution of Maryland makes it clear that the Court of Special Appeals may exercise only appellate jurisdiction.
>
> ...
>
> That the exercise of appellate jurisdiction requires a prior action by some *judicial* authority, or the prior exercise of *judicial* power, has been regularly recognized by the courts of this country. And courts have held that review of the decision of an administrative agency is an exercise of original jurisdiction and not of appellate jurisdiction.

Shell Oil Co. v. Supervisor of Assessments of Prince George's County, 276 Md. 36, 42-43, 343 A.2d 521 (1975) (citations omitted).

The Public Defender is an executive agency and we do not directly review its discretionary decisions-to do so would be an exercise of original jurisdiction and outside the scope of our authority. If the Public Defender has abused its discretion, as appellant claims, by not providing funding for an expert witness, the matter is best left to post-conviction proceedings. As this Court noted: "Although the State Public Defender has discretion over the expenditure of funds on behalf of his indigent clients, if it appears that such discretion has been abused, the matter may be appropriately considered in post [-]conviction proceedings." *Gorman v. State,* 67 Md.App. 398, 407, 507 A.2d 1160 (1986). The Court of Appeals recently stated:

> We have explained on numerous occasions that a post-conviction proceeding pursuant to Maryland Uniform Post Conviction Procedure Act, Maryland Code, § 7-102 of the Criminal Procedure Article (2001), is the most appropriate way to raise the claim of ineffective assistance of counsel. The Act allows the convicted person to attack the judgment collaterally by challenging the legality of the conviction and incarceration in a separate evidentiary proceeding. A post-conviction proceeding, often called a "collateral proceeding," brought under the Act is not an appeal of the judgment; rather, it is a collateral attack designed to address alleged constitutional, jurisdictional, or other fundamental violations that occurred at trial.

Mosley v. State, 378 Md. 548, 558-560, 836 A.2d 678 (2003) (citations and footnotes omitted).

I

Appellant avers that the public defender and the lower court violated Maryland's statutory framework providing legal aid to indigents and that his constitutional rights to due process of law, equal protection of law, and effective assistance of counsel were violated by denying the funding required for his expert to testify. In response, the State asserts that any statutory or constitutional requirement to provide appellant funding for expert testimony is contingent upon indigency. Because appellant had retained private counsel, the State suggests that he could not be deemed indigent for purposes of any statutory or constitutional analysis. Moreover, the State contends that even if appellant could qualify as an indigent, he did not make a necessary showing to establish indigency.

Appellant's arguments are based on the assumption that he is indigent. In his brief, appellant states that his "indigency has never been controverted or even challenged." We agree with the State, however, that appellant's indigency is in question and that he must first establish that he was indigent in order to prevail under any statutory or constitutional arguments. Thus, we begin our discussion on the issue of appellant's indigency by addressing the State's suggestion that appellant could not be considered indigent because he had employed private counsel.

A

In the instant case, appellant hired private counsel, who provided appellant with representation throughout his trial. Also, in an attempt to challenge the State's DNA evidence, appellant hired an expert to analyze the evidence and prepare a report setting forth his findings. Although the expert

performed an analysis and prepared a report, he would not testify at trial without a further fee. Unable to make any additional payment to the expert, appellant claimed to be indigent and requested funds from the Public Defender's Office and the lower court in order to pay for the testimony of his expert. Appellant's ability to compensate private counsel, accompanied by his subsequent claim of indigency, presents us with a question of first impression in Maryland: whether a defendant, who has retained private counsel, can still be considered indigent for purposes of receiving funding for other services associated with legal representation, such as funding for an expert witness.

"Indigent" is defined in art. 27, § 2 as a person who "states in writing that he [or she] is financially unable, without undue hardship, to provide for the *full payment of an attorney and all other necessary expenses of legal representation.*" (Emphasis added.) Additionally, the Public Defender Statute bases eligibility for services on need. "Need" is defined in § 7(a): "Need shall be measured according to the financial ability of the person to *engage and compensate competent private counsel and to provide all other necessary expenses of representation.*" (Emphasis added.) Therefore, a defendant who demonstrates both an inability to "compensate competent private counsel" and to "provide all other necessary expenses of representation" clearly is considered indigent under the Public Defender Statute and is entitled to the full range of services provided for by the Public Defender. The more determinative question in this case, however, is whether a defendant who demonstrates an inability to fully pay for only one service, whether it be legal representation or the expense of necessary services associated with legal representation, can be considered indigent under the statute. In other words, can a defendant retain private counsel and yet claim to be indigent for purposes of associated legal services, thus allowing

representation by the Public Defender to be severed from other services accompanying its legal representation, such as expert testimony?

As noted, *supra,* Maryland case law provides little guidance to aid us in determining if appellant was required to be without funds for both legal representation and other necessary expenses or if only his inability to pay for the DNA expert was sufficient to establish indigency under the Maryland's Public Defender Statute. We have uncovered decisions in other jurisdictions, however, in which defendants retained private counsel, but nevertheless attempted to obtain payment for other services under a comparable public defender's statute.

In *Morton v. Kentucky,* 817 S.W.2d 218 (Ky.1991), the Kentucky Supreme Court dealt with a defendant who paid $100 to a private attorney to represent him. Thereafter, the defendant declared himself indigent, stating that he was "unable to provide any additional money for legal presentation or to afford expert witnesses to testify in his behalf ... to assure that (he received) his constitutional due process right to a fair trial." *Id.* at 219. The defendant's private counsel was willing to continue on a *pro bono* basis, but the lower court required the defendant's private counsel to withdraw and appointed the public defender as counsel. Following trial, the defendant appealed, arguing that he had been entitled to the benefits of Kentucky's public defender statute while retaining his private counsel. On appeal, the Kentucky Supreme Court explained:

> A more difficult question is whether the trial court erred in its determination that a defendant who seeks and obtains the benefits

> of KRS 31.110(1)(b)[33] may not be represented by retained counsel who declares his [or her] intention to continue on a *pro bono* basis. [The defendant] correctly observes that the statute contains no express prohibition against having the Commonwealth provide "the necessary services and facilities of representation" when the defendant has obtained his [or her] own counsel. Be this as it may, in our view, [the public defender statute] is a unified enactment which contemplates the necessity of a comprehensive determination whether a defendant qualifies for the benefits provided. For it to be determined that he [or she] does, he [or she] must be without the independent means to obtain counsel. The statute surely does not contemplate that a defendant would be indigent for purposes of KRS 31.110(1)(b), but still able to hire an attorney. If such were the case, rarely would any defendant step forward to pay investigative costs and other services necessary for his [or her] representation. Indeed, [under the statute] "needy person" or " indigent person" is defined as "a person who at the time his [or

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[33] Kentucky Rev. Stat. Ann. 31.110(1) provides: A needy person who is being detained by a law enforcement officer, on suspicion of having committed, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime ... is entitled:

> (a) To be represented by an attorney to the same extent as a person having his [or her] own counsel is so entitled; and
> (b) To be provided with the necessary services and facilities of representation including investigation and other preparation. The courts in which the defendant is tried shall waive all costs.

> her] need is determined is unable to provide for the payment of an attorney and all other necessary expenses of representation." Under this definition and the general tenor of the entire Act, inability to obtain counsel and inability to obtain necessary services must go hand-in-hand.
>
> In an unusual case, however, it may be that an indigent defendant can obtain counsel which is truly *pro bono;* counsel who has neither sought nor obtained any fee or the promise thereof for legal services rendered or promised. In such a circumstance, the dual benefits provided by the Act would indeed be severed. The defendant would be indigent for purposes of necessary services and facilities, but otherwise be able to provide his [or her] own counsel without cost to himself [or herself]. When such a circumstance produces the severance between ability to obtain counsel and need for other necessary expenses, the statute may be interpreted to permit the trial court to grant indigency status for purposes of KRS 31.110(1)(b) only.
>
> *Id.* at 220-21 (footnote added).

Other jurisdictions have also disallowed severance of the public defender's representation from the other services provided by the public defender. *See People v. Cardenas,* 62 P.3d 621, 622-23 (Colo.2002) (holding that defendant represented by a *pro bono* private attorney was not entitled to funding through the public defender's office for the cost of an interpreter to translate out-of-court discussions and that if the "defendant want[ed] the state to pay the costs of ... supporting services, his [or her] only choice [was] to be

represented by the public defender"); *Subin v. Ulmer,* 131 N.M. 350, 36 P.3d 441, 443-44 (2001) (holding that a court could not order the public defender to provide expert witness services to a defendant represented by private counsel when the public defender's office had a policy which required that the defendant first be a client of the public defender before he or she could avail himself or herself of the other services provided by the public defender).

Delaware has taken a slightly more proactive approach by instituting procedures in which a defendant who is initially represented by private counsel can still obtain funding for supporting services. While Delaware generally prohibits the severance of the dual benefits provided for under its public defender statute, defendants represented by private counsel are permitted to obtain funding for a private expert if their private counsel withdraws. The Delaware Supreme Court outlined the following procedure:

> First, a request for public funds to retain an expert witness must be "deemed an application (by private counsel) for leave to withdraw as counsel and for representation thenceforth by the Public Defender on the ground of indigency." Second, the trial court must determine whether the defendant is indigent and thus eligible to receive assistance from the Public Defender under [the public defender statute]. Third, if the trial court finds that the defendant is indigent, the court is instructed to permit the defendant's private counsel to withdraw and to refer the defendant's case to the Public Defender.

Chao v. State, 780 A.2d 1060, 1066-67 (Del.2001) (citing *Office of the Public Defender v. Thompson,* 451 A.2d 835,

837 (Del.1982)).

Also, in situations wherein the defendant has retained a *pro bono* attorney, the Delaware Supreme Court established an additional procedure, permitting *pro bono* private counsel to continue to advocate for the defendant while allowing the defendant to obtain funding from the public defender's office for expert services. It opined:

> In this situation, an indigent defendant represented by private counsel may request that the Superior Court exercise its discretion to allocate funds to pay for expert services if the trial court finds, after a hearing, that (1) the defendant is indigent; (2) private counsel is providing legal services without charge ("*pro bono publico* private counsel"); (3) it would [be] inappropriate to require *pro bono publico* private counsel to withdraw in favor of the Public Defender; and (4) the services are "necessary for adequate representation" in the circumstances.

Id. at 1063.

In contrast to the above jurisdictions, some states draw no distinctions between defendants represented by private counsel and those represented by the public defender. Any ancillary services provided by the public defender are severable from representation by the public defender and, therefore, representation by the public defender is not a prerequisite to obtaining an expert witness or other collateral funding. The only precondition to obtaining funding is a determination that the defendant makes a proper showing of indigency and necessity. *See Jacobson v. Anderson,* 203 Ariz. 543, 57 P.3d 733, 734-35 (2002) (permitting

defendants represented by private counsel to declare themselves indigent for purposes of requesting the appointment of an expert witness); *State v. Burns,* 4 P.3d 795, 801-02 (Utah 2000) (holding that, although the ability to hire a private attorney is a factor in determining indigency, it is not the determinative factor and will not necessarily bar a defendant from obtaining a medical expert funded by the public defender's office); *Cain v. State,* 758 So.2d 1257, 1258-59 (Fla.Dist.Ct.App.2000) (allowing a defendant, who was deemed to be "partially indigent" due to his representation by private counsel, to obtain costs for experts); *In re Cannady,* 126 N.J. 486, 600 A.2d 459, 462 (1991) (holding that a defendant represented by private counsel could obtain funding for an expert witness because "Nowhere in the [public defender] Act is there a requirement that a defendant obtain legal services from the [office of the public defender] before he or she may obtain ancillary services from it"); *State ex rel. Rojas v. Wilkes,* 193 W.Va. 206, 455 S.E.2d 575, 577-78 (1995) (opining that retention of private counsel by a third party does not prohibit a defendant from being deemed indigent and qualifying for publicly funded expert assistance); *English v. Missildine,* 311 N.W.2d 292, 293-94 (Iowa 1981) (holding that representation by private counsel does not affect a defendant's status as an indigent and does not forbid state expenditure of funds for an expert).

We agree with those states which hold that the dual services provided by the public defender are not severable. The language of art. 27A, § 2, defining indigent as a person unable "to provide for the full payment of an attorney and all other necessary expenses of legal representation," is a unified enactment and does not contemplate that a defendant could be indigent for purposes of "all other necessary expenses" and yet able to retain private counsel. *See Morton,* 817 S.W.2d at 220. We adopt Kentucky's position that,

"[u]nder this definition and the general tenor of the entire Act, inability to obtain counsel and inability to obtain necessary services go hand in hand." *Id.* Thus, any funding for the necessary services associated with representation are conditioned upon representation by the Public Defender.

In the case *sub judice,* appellant paid to be represented by private counsel and did not seek representation through the public defender. Therefore, appellant is not indigent and is foreclosed from requesting public funding for a DNA expert, either through the Public Defender's Office or the lower court. This is not to say that a defendant who proceeds with private counsel cannot later become indigent, apply for representation with the Public Defender, and avail himself or herself of the benefits of other necessary services such as an expert witness. We hold only that a defendant who pays for and retains private counsel throughout the adjudicatory process cannot be deemed indigent for purposes of obtaining a publically funded expert witness. Additionally, because appellant's counsel was not providing *pro bono* services, we do not express an opinion on whether a defendant with *pro bono* private counsel is entitled to funding for other services associated with representation.[34]

B

Appellant argues that the Public Defender and the trial court erred by not complying with the Public Defender Statute. Specifically, he contends that the Public Defender was required under art. 27A to provide funding for an expert

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[34] Having concluded that appellant was not indigent for purposes of Maryland's Public Defender Statute, we could end our analysis here. We will, however, address appellant's additional arguments in order to clarify the role of the Public Defender and trial court in the arena of expert witness funding for indigent defendants.

witness regardless of whether appellant had retained private counsel. Also, appellant maintains that, after the Public Defender's denial, the trial court was required under art. 27A to make an independent determination of whether he was indigent and thus entitled to funding for an expert at State expense. The trial court failed to make this inquiry, posits appellant, by only determining whether court funds were available, not whether appellant was indigent.

As noted, *supra,* we do not review the actions of the Public Defender but only the judgments of the trial court. Therefore, we need only determine whether the trial court, under art. 27A, erred by not ordering the Public Defender to provide the funding, or in the alternative, by not providing funding through Howard County.

Whether the trial court may order the Public Defender to provide legal representation in the form of either legal counsel or funding is controlled by art. 27A. Art. 27A, § 1, sets out the legislative intent concerning the authority and duties of the Public Defender:

> It is hereby declared to be the policy of the State of Maryland to provide for the realization of the constitutional guarantees of counsel in the representation of indigents, including related necessary services and facilities, in criminal and juvenile proceedings with the State, and to assure effective assistance and continuity of counsel to indigent accused taken into custody and indigent defendants in criminal and juvenile proceedings before the courts of the State of Maryland, and *to authorize the Office of Public Defender to administer and assure*

> *enforcement of the provisions of this article in accordance with its terms.*

(Emphasis added.)

The Office of the Public Defender was established in the executive branch of the government. Md.Code, art. 27A, § 3; *Webster v. State,* 299 Md. 581, 603, 474 A.2d 1305 (1984). Therefore, the question of whether legal representation will be provided by the Office of the Public Defender is left solely to the discretion of the Public Defender. *Thompson v. State,* 284 Md. 113, 128, 394 A.2d 1190 (1978). The Court of Appeals addressed the interaction of a trial court and the Public Defender in *Thompson.* It stated:

> The Public Defender wanted to leave it up to the court, making clear that if the courts so ordered he would provide representation. The court refused to so order, properly we believe, on the ground that the question whether the Public Defender represented a particular defendant was for the Public Defender and not for the court.

Id.[35]

As a result, in the case *sub judice,* we do not review the circuit court's decision not to order the public defender to provide funding for appellant's expert witness. Therefore, in

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[35] *See also Subin,* 36 P.3d at 443-44. In *Subin,* the Court of Appeals of New Mexico, in dealing with a similar issue, held that the trial court did not have constitutional or statutory authority to order the public defender to provide funding, stating that it would "be an unwarranted intrusion into the administrative affairs of another agency." *Id.*

the context of art. 27A, we need only review whether the trial court was required to provide State funding under art. 27A. As we have explained:

> [T]he Court of Appeals seemed to hold that if the Public Defender declines to represent a defendant-even on the grounds of non-eligibility (as opposed to a potential conflict of interest)-the court has no authority to order him to provide representation. Upon that premise, the question before us is not whether the Public Defender erred in declining representation but whether the court was derelict in discharging its own responsibility to assure compliance with appellant's Constitutional right of counsel, in accordance with its authority under § 6(f) of art. 27A.

Baldwin v. State, 51 Md.App. 538, 552-53, 444 A.2d 1058 (1982).

The duties and powers of the circuit court under the Public Defender Statute are set forth in art. 27A, § 6(f):

> Nothing in this article shall be construed to deprive [the circuit court] ... of its authority to *appoint an attorney* to represent an indigent person where there is a conflict in legal representation in a matter involving multiple defendants and one of the defendants is represented by or through the Office of the Public Defender, or where the Office of the Public Defender declines to provide representation to an indigent person entitled to representation under this article.

(Emphasis added.)

Section 6(f) has been interpreted as requiring that, when the Public Defender declines to provide representation, the court should "make its own independent determination whether a defendant is indigent and otherwise eligible to have counsel provided." *Thompson,* 284 Md. at 129, 394 A.2d 1190. The independent court evaluation necessarily emanates from the judiciary's role as the "ultimate protector" of the indigent's right to counsel. *Davis v. State,* 100 Md.App. 369, 380-81, 641 A.2d 941 (1994); *Baldwin,* 51 Md.App. at 552, 444 A.2d 1058. Section 6(f), however, fully defines the court's power by "specifically limit[ing] the court's authority to appoint an attorney to represent an indigent person" to those instances set forth in § 6(f). *Harris v. State,* 344 Md. 497, 513, 687 A.2d 970 (1997).

In the instant case, the trial court was not authorized under § 6(f), as appellant contends, to provide funding for his expert witness. Section 6(f) deals with the appointment of counsel and not with the court's authority in providing funding for the testimony of an expert defense witness. Additionally, the power delegated under § 6(f) only requires the trial court to make an independent determination of indigency in instances when the defendant otherwise does not have counsel. Appellant had already obtained private counsel and was represented at trial. Therefore, the trial court was under no obligation to exercise its authority under § 6(f). For these reasons, we hold that the lower court did not err under § 6(f) of the Public Defender Statute by declining to provide funding for appellant's expert DNA witness.

C

Appellant also maintains that the denial by the Public Defender and the trial court of funding for an expert DNA witness violated his rights to due process of law, equal

protection of law, and effective assistance of counsel. As discussed, *supra,* however, we do not directly review the actions of the Public Defender and therefore, we will only address the denial by the trial court. In relation to the actions of the trial court, appellant argues that the lower court was constitutionally required to provide funding for his expert witness. According to appellant, an expert defense witness was necessary in order for him to fully develop a defense in challenging the State's DNA evidence. The lack of an expert, he says, denied him meaningful access to the judicial process as is constitutionally required.

The Court of Appeals addressed the constitutional rights of indigent defendants in the context of funding for expert witnesses in *Johnson v. State,* 292 Md. 405, 439 A.2d 542 (1982). In *Johnson,* an indigent defendant, who was being tried for murder, raised the insanity defense. Although the defendant requested funding for the appointment of a private psychiatrist, the trial court ordered the transfer of the defendant to a State mental hospital for a psychiatric evaluation. The hospital issued a report which stated, in part, that the defendant was "not suffering from a mental disorder which caused him to lack substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." *Id.* at 410, 439 A.2d 542. The defendant was subsequently tried, convicted, and sentenced to death. In his appeal, the defendant argued that the " refusal of his request for appointment of a private psychiatrist effectively denied him the rights to the assistance of counsel, due process of law, and the equal protection of law in violation of various State and Federal Constitutional guarantees." *Id.* at 412, 439 A.2d 542.

In addressing the defendant's argument, the Court in *Johnson* opined:

Some courts view the right secured in *Gideon* [*v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)] as additionally requiring the assistance of experts or investigators when necessary to provide an indigent with the effective assistance of counsel. Other courts, however, hold the view that the Constitution does not create any right to such expert assistance.

...

Common sense dictates that there be some limit placed upon the right of indigents to the assistance of State-funded experts. This is not a case where the government has refused to provide psychiatric evaluation of a criminal accused who wishes to interpose an insanity defense, or where the resulting report is withheld from the defendant. Nor has appellant in this case produced evidence challenging the professional competence or impartiality of the psychiatrists at the [State hospital].

...

Certainly, in these circumstances the indigent accused is at a disadvantage when compared with the wealthy defendant who possesses unlimited resources for the marshalling of batteries of attorneys, investigators and experts. It cannot be seriously contended, however, that the State must precisely equalize the position of the penurious defendant and the wealthy one.... Whatever the amount of required State assistance for the

> appointment of defense experts to enable the indigent to place the issue of insanity before the trial court, we need not determine here, for it is certain that once an accused is evaluated by [S]tate[-]funded, impartial and competent psychiatrists, that constitutional duty, if any ends. "*[T]he State has no constitutional obligation to promote a battle between psychiatric experts 'by supplying defense counsel with funds wherewith to hunt around for other experts who may be willing, as witnesses for the defense, to offer the opinion that the accused is criminally insane.'* "

Id. at 413-15, 439 A.2d 542 (quoting *Swanson v. State,* 9 Md.App. 594, 601-02, 267 A.2d 270 (1970))(emphasis added; citations omitted).

In the case *sub judice,* the DNA samples collected at the crime scene were tested by an independent laboratory-Cellmark. Although the State contracted with Cellmark to perform the analysis, there is nothing to indicate that Cellmark's evaluation of the samples was not impartial, scientific, and objective. Additionally, appellant's counsel was provided with all the DNA documents and reports generated by Cellmark prior to trial in order to prepare a defense. Thus, the State provided expert analysis and any constitutional duty had ended after that point. This is not a case in which the State obtained a conviction absent any DNA analysis when such evidence was available to possibly exonerate appellant. Cellmark performed a sufficient analysis and, as the *Johnson* Court noted, the State is not obligated to promote a battle between experts. *Id.* at 415, 439 A.2d 542.

Furthermore, the objective nature of DNA analysis lends

further support for the reasoning set forth in *Johnson.* In *Johnson,* the Court of Appeals held that the use of one State psychiatric evaluation was sufficient for the defendant's insanity defense in a death penalty case. A psychiatric evaluation, however, is usually considered much more subjective in nature than a DNA analysis. Therefore, appellant's constitutional rights enjoyed more protection than the defendant in *Johnson.* For these reasons, we hold that appellant's constitutional rights were not violated when the trial court refused to provide funding for an additional DNA expert.

Despite the holding of *Johnson,* appellant relies on *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), in advancing the proposition that he is constitutionally entitled to funding for a defense expert. In *Ake,* the U.S. Supreme Court dealt with the rights of an indigent on trial for murder. The primary issue was whether the State was required to fund a psychiatric evaluation of the indigent defendant in preparation of a potential insanity defense. The State had a psychiatrist evaluate the defendant, who concluded that the defendant was dangerous. The State's evaluation, however, did not make a determination with respect to criminal responsibility. The defendant wanted the State to fund an additional psychiatric evaluation as to his sanity at the time of the offense. The trial court denied the defendant's request and the defendant was subsequently convicted and sentenced to death, based in part on the State's uncontradicted conclusion that he was dangerous. On appeal the U.S. Supreme Court held:

> We therefore hold that when a defendant demonstrates to the trial judge that his [or her] sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a

> competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. *This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his [or her] personal liking or to receive funds to hire his [or her] own.* Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the States the decision on how to implement this right.

Id. at 83, 105 S.Ct. 1087.

By implication, appellant suggests that *Ake* overrules *Johnson.* His interpretation is erroneous. In *Ake,* the defendant was not afforded any psychiatric evaluation in regard to criminal responsibility at the time of the murder. Thus, the defendant lacked any means to present an insanity defense. In *Johnson,* by contrast, the defendant had been provided an evaluation as to criminal responsibility at the time of the murder and therefore had a basis from which to consider the insanity defense. The result of *Johnson* is in compliance with the requirements set forth in *Ake.* The defendant in *Johnson* was given access to a competent psychiatrist who conducted an appropriate examination.

As this Court explained in *Djadi v. State,* 72 Md.App. 223, 230-31, 528 A.2d 502 (1987):

> Appellant argues that *Johnson* is no longer valid, that it has been compromised by *Ake v. Oklahoma.* We do not agree; *Ake* is entirely inapposite.

...

> None of the doctors had evaluated Ake with respect to criminal responsibility and none had ventured an opinion on that issue. Ake, an indigent, asked the court to arrange for a psychiatric evaluation as to his "sanity at the time of the offense," which the court refused to do. He was therefore left with no psychiatric opinion on that critical issue and, under Oklahoma law, the burden of producing evidence as to his insanity.

...

Ake does not overrule *Johnson;* indeed it supports *Johnson.* The State [had] fully complied with the requirements of *Ake.*

II

Appellant's final contention is that the trial court erred by refusing to admit character evidence that was intended to show that a separately tried co-defendant had a propensity toward violence. According to appellant, a defendant is permitted to introduce evidence of past crimes, acts, or wrongs of a third party. The prohibition on such evidence, avers appellant, only applies to the defendant on trial and not to other persons. He also argues that the trial court's error was not harmless and thus requests that his conviction be reversed.

At trial, appellant defended, in part, on the theory that Brill was solely responsible for the murder of Mason. In order to support his theory, appellant attempted on two occasions during trial to introduce evidence of Brill's past acts of violence toward women. On both occasions, however, the trial court precluded the evidence. For example, when appellant attempted to introduce evidence that Brill had assaulted his sister, the following colloquy occurred:

[APPELLANT'S COUNSEL]: I see. Isn't it true, ma'am, that your brother, Scott Brill assaulted you?
[THE WITNESS]: No.
[PROSECUTOR]: Objection, Your Honor.
THE COURT: Come up, please.
(Counsel and the defendant approached the bench and the following ensued:)
[PROSECUTOR]: I don't see the relevance (undistinguishable).
[APPELLANT'S COUNSEL]: I think it's relevant. (Undistinguishable) somebody is charged-somebody killed Ashley Mason and they're trying to say that [appellant] killed Ashley Mason and we believe that Scott Brill has assaulted his sister on more than one occasion. I mean Scott Brill

(undistinguishable)-
THE COURT: (Undistinguishable.) Therefore the jury could conclude that if the question is whether this defendant assaulted anybody or whether he was a violent person what's the relevance of Scott Brill's-whether or not he assaulted his sister[?]
[APPELLANT'S COUNSEL]: To show that Scott Brill is a violent person who is just as capable as-of-in fact is more capable of killing Ashley Mason.
[PROSECUTOR]: (Undistinguishable) other crimes (undistinguishable) very recently can't show propensity to commit (undistinguishable) crimes being committed.
THE COURT: I'll sustain the objection. I don't think it's ...

Maryland Rule 5-404(b) deals with evidence of other crimes, wrongs, and acts, as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

Appellant relies on *Sessoms v. State,* 357 Md. 274, 744 A.2d 9 (2000), to support the contention that the evidence of crimes, wrongs, or acts prohibited under Rule 5-404(b) only applies to the defendant and not third parties. In *Sessoms,* the defendant was charged with rape, assault, and other sexual offenses. He defended on the grounds that the alleged rape victim falsely accused him of rape in order to cover for her brother's involvement in the robbery of the defendant and another individual named Pitman. The defendant claimed that he was attacked, rendered unconscious, robbed, and

awoke to a rape charge. At trial for the rape, the defendant wanted to introduce evidence of Pitman's robbery by the alleged rape victim's brother in an attempt to build his defense. The trial court excluded the evidence on the grounds that it was impermissible under Rule 5-404(b).

On appeal, the Court of Appeals reversed, holding that the prohibition in Rule 5-404(b) does not apply when a defendant proffers other crimes, wrongs, or acts of a third party in an attempt to exculpate himself or herself. *Id.* at 290-92, 744 A.2d 9. In a survey of other states, the Court of Appeals stated:

> Several states have made similar interpretations of their other crimes evidence statutes. [*Colorado v.*] *Flowers,* 644 P.2d [916,] 919 [1982]("The test for admissibility of similar offense evidence introduced by the defendant ... must (be) decide(d) ... on a case-by-case basis."); *People v. Bueno,* 626 P.2d 1167, 1170 (Colo.Ct.App.1981) ("When offered by the defendant, evidence of similar transactions is admissible as long as it is relevant to the guilt or innocence of the accused."); *Commonwealth v. Jewett,* 392 Mass. 558, 563, 467 N.E.2d 155, 158 (1984) ("When a defendant offers exculpatory evidence ... prejudice ceases to be a factor, and relevance should function as the admissibility standard."); *Garfole,* 76 N.J. at 452-53, 388 A.2d at 591 ("When the defendant is offering (other crimes evidence) exculpatorily, prejudice to the defendant is no longer a factor, and simple relevance to guilt or innocence should suffice as the standard of admissibility, since ordinarily ... an accused is

> entitled to advance in his [or her] defense any evidence which may rationally tend to refute his [or her] guilt or buttress his [or her] innocence of the charge made."); *State v. Dreher,* 302 N.J.Super. 408, 456-57, 695 A.2d 672, 695 (App.Div.) ("(O)ther crimes' evidence about a State's witness is often admitted when offered by criminal defendants for exculpatory reasons."), *cert. denied,* 152 N.J. 10, 702 A.2d 349 (1997); *Williams,* 214 N.J.Super. at 20, 518 A.2d at 238 ("It is well established that a defendant may use similar 'other crimes' evidence defensively if in reason it tends, alone or with other evidence, to negate his [or her] guilt of the crime charged against him.")

Id. at 290-91, 744 A.2d 9.

The Court of Appeals adopted the reasoning set forth by the other states, stating: "We hold that the same interpretation shall be given to Maryland Rule 5-404(b)." *Id.* at 291, 744 A.2d 9. Applying the rule to the facts in *Sessoms,* the Court held that, "[a]lthough the evidence [defendant] wanted to present did not directly point towards someone else committing the crime, it does provide a theory of the case that attempts to exculpate him." *Id.* The evidence was held to be exculpatory because it would have helped the defendant establish that he was robbed and rendered unconscious and thus unable to rape the alleged victim.

The task of determining whether the proffered evidence exculpates the defendant or gives credence to the theory that someone else other than the defendant committed the crime is approached on a case-by-case basis. *Sessoms,* 357 Md. at 290, 743 A.2d 759; *Bueno,* 626 P.2d at 1170; *see also Wilson*

v. State, 148 Md.App. 601, 645, 814 A.2d 1 (2002). In the case *sub judice,* the evidence proffered by appellant did not exculpate him, but rather only made it more likely that Brill was involved in the murder of Mason. Evidence of Brill's past assaults on women, even when viewed in conjunction with all the evidence, does not make it less probable that appellant participated in Mason's murder. If appellant offered other crimes evidence that demonstrated his inability to commit the crime at the time, as did the defendant in *Sessoms,* then the evidence would be relevant. Given the facts here, however, evidence of Brill's past assaults on women is not relevant to appellant's guilt or innocence. Therefore, we hold that the trial judge properly sustained the State's objection.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

APPENDIX D

IN THE CIRCUIT COURT FOR HOWARD COUNTY

STATE OF MARYLAND
vs.

Criminal Case No. 13-K-01-39996

FREDERICK MOORE
Defendant

REPORTER'S OFFICIAL TRANSCRIPT OF
PROCEEDING
(MOTIONS HEARING)
VOLUME I OF I

HOWARD COUNTY, MARYLAND
Monday, January 14, 2002

BEFORE:

Honorable Raymond J. Kane, Jr.

APPEARANCES:

For the State:
Kim Oldham, Esquire
Michael Rexroad, Esquire

For the Defense:
Sheldon Mazelis, Esquire

Carla L. Poole, Typist
Shirley Reynolds, Office Court Reporter
8360 Court Avenue
Ellicott City, Maryland 21043

THE COURT: Do you want to first address the Defendant's motion to have – I'm not trying to – what I have styled as to have funds made available to retain an expert?

MR. MAZELIS: Yes, Your Honor, it was late in the case when I determined that – well, let me start from the beginning. Your Honor, Mr. Moore came to me as a client who probably would have been allowed a Public Defender. He simply did not have the funds. I don't believe he was working. His mother did not have the funds to hire an attorney and Mr. Moore happened to have been involved in a motor vehicle accident and, as a result, had received some funds or was receiving some funds – at about the same time that he was arrested for this charge. At that time, I spoke with his mother, initially, and then with Mr. Moore, regarding the payment of counsel fee for this case. Having known Mr. Moore for the time that I did and, in fact, having known the Ritter family for the time that I did, who actually referred Mr. Moore to me, initially – I agreed to represent Mr. Moore. And then, we got into all of the DNA testimony and evidence, rather, and it became quite obvious that Mr. Moore would be prejudiced if he were not allowed to have an expert as the State was allowed to have an expert. If he were a client of the Public Defender's office, they would have the funds to provide for an expert for Mr. Moore. If Mr. Moore was wealthy, and if his family was wealthy, they could provide the funds but, neither of those cases are true. Mr. Moore is here unfortunately, without the funds to pay for an expert. So, that is why we filed that motion. He is being denied the right, I think, to have an expert testify on his behalf. Not because of his race. Not because of his age. Not because of who he is but, rather, because he doesn't have the funds to pay for it. And that's the basis of the motions.

THE COURT: And you would ask that funds be provided for him to retain an expert?

MR. MAZELIS: Well, we know that the Public Defender's office has the funds – or I should say the Public Defender's office pays for the experts in these cases. I don't know whether Your Honor has the authority to order the Public Defender to pay funds or whether the Court has funds in some form set aside for such purposes. I don't know. I – I truly don't know. I felt the need to file that motion. I felt it was important to get that point for the record and to the Court because I do feel it's a prejudice to anyone who comes before the Court on a serious matter where experts are necessary. I see the cost that Cellmark charges to the State and what it costs to do this. It's just impossible for anyone to properly defend a case unless they have thousands and thousands of dollars just to pay experts.

THE COURT: So the relief – just so I understand it – the relief you're requesting is that I either order the Office of Public Defender to appropriate funds for this purpose or utilize Court funds for that purpose?

MR. MAZELIS: Yes sir.

THE COURT: Have you had any discussions with any tentative experts or can you relate to me what you anticipate those services would amount to and some idea of the cost of those services?

MR. MAZELIS: Yes. I have spoken to and have worked to some degree with Dr. J. Thomas McClintock. He is with DNA Diagnostics, Inc. Dr. McClintock has, in fact, worked with me on this case to a degree. We were able to come up with some funds, initially, to get the doctor to help me with some preparation. His fee is $225.00 per hour, with a minimum of four hours and a maximum of ten hours. I don't anticipate there being ten hours worth of work here, so

I would imagine somewhere between the four and the ten at a cost of $225.00 per hour.

THE COURT: And you would think that would be – the funds in that amount would be sufficient for you to acquire the services of an expert for whatever purposes you sought?

MR. MAZELIS: Yes Sir.

THE COURT: Would you have anything further on the issue?

MR. MAZELIS: Nothing further.

THE COURT: Would the State want to respond?

MR. REXROAD: Your Honor, the State is not taking position as pursuant to its answer to the Defendant's motion. With respect to that, I am deferring to the Court.

THE COURT: I see the Public Defender – I don't know if she just happened to be in the neighborhood and it was raining outside and she came in – I just –

MR. REXROAD: No, Your Honor. Your Honor – no. I had conversation with the Public Defender since they were mentioned in the motion. They were copied by the Defense Counsel. They thought it might be important for the Court to hear from Carol Hanson – the District Public Defender, with respect to whether they would be, or could – would be willing to pay for this particular cost.

THE COURT: Is there any objections for me hearing from her?

MR. MARZELIS [sic]: No, not at all.

THE COURT: I mean – I'd – like to afford her a chance to be heard before I address the issue.

MS. HANSON: Thank you, Your Honor.

THE COURT: Is there any request that she be sworn in as a Witness?

MR. REXROAD: Not from the State.

MR. MAZELIS: No, Sir.

THE COURT: Would you? –

MS. HANSON: Your Honor, if I may. For the record, Carol Hanson, District Public Defender. Upon discussion with Mr. Rexroad and upon reviewing the pleadings, I telephoned Mr. Mazelis and gave him the bad news, which is that the policy of the Office of the Public Defender is that we do not provide funds for experts in private counsel cases. That was my understanding of the policy. To confirm that, I telephoned the Deputy Public Defender, Ms. Forrester. I spoke to Mr. Harris. That is the policy. They are not willing to make an exception. We do not have funds available for private counsel cases for experts and we would ask that the Court not order us to make funds available. Thank you, Your Honor.

THE COURT: Would anybody have any questions of Ms. Hanson?

MR. REXROAD: I'm sorry, Your Honor, I couldn't hear you.

THE COURT: Would any – either of you have any questions or? –

MR. REXROAD: Not from the State.

MR. MAZELIS: I would have just one question – I think just one or two questions, Your Honor. I'd like to know if the funds – if there are funds available and it's just a policy not to provide those funds to clients of private counsel.

MS. HANSON: I'm the District Public Defender for Howard and Carroll County. When we meet experts, we check with the administration. It's my understanding that the Office has some funds for some experts. It's controlled by the administration, which is the office at 6 St. Paul Street – Mr. Harris, Ms. Forrester. The policy is that we do not make funds available to private counsel cases. To my knowledge, that's been the policy in the sixteen and a half years that I've been District Public Defender.

MR. MAZELIS: I have no other questions, Your Honor.

THE COURT: Fine.

MS. HANSON: Would Your Honor have any questions?

THE COURT: I'm thinking. To your knowledge, Ms. Hanson, I take it you have not, in the past, utilized Public Defender funds to provide for experts in cases where a Defendant had private counsel?

MS. HANSON: Not to my knowledge, Your Honor. The only case I am recalling where this actually became quite an issue is the transcript case in the State of Maryland

vs. Bernard Miller and we would not pay for the transcripts in that case. We have been asked before to provide funds for experts –

THE COURT: And that issue was litigated, as I recall.

MS. HANSON: It was, Your Honor. So, we do not and have not to my knowledge.

THE COURT: I could – could I just ask you to remain available for a few minutes – I am no longer responsible for the budget, fortunately, but I think I have a sense of what the budget, the judiciary budget, involves and has available to it. In fact, I submitted that budget on behalf o the judiciary – but let me step off the bench, just momentarily, to confirm that there hasn't been a great infusion of money into the judicial budget in the last week or two but – just give me a minute to step off the bench. Fair enough? And I won't keep the Public Defender here long, I just need to have a minute.

THE CLERK: All rise.

THE COURT: Be seated. Mr. Rexroad has just stepped out, or ...?

MS. OLDHAM: Yes, Your Honor. If the Court wishes to proceed, that's fine.

THE COURT: Would you like me to proceed in his absence, or ...?

MS. OLDHAM: That's fine, Your Honor.

THE COURT: I mean, if he's going to just be a minute or so – in fact, here he is. During the recess – first of all, the Counsel and the Defendant are present. I just confirmed with Judge Leasure, the administrative Judge, that – with reference to the availability of Court funds and she confirms or advises me that there are no Court funds dedicated or available to provide in general for experts in cases where an individual will have private counsel and, specifically, there are not funds available – Court funds available to provide for the expert in this case. I am mindful of the Appellate Courts of the Fourth Circuit Opinion in the Miller case that, as I understand it, suggests that there is a vehicle afforded in the State of Maryland to provide counsel and the costs incurred and appeals and, as Ms. Hanson said, the issue in the Miller case was the cost of a transcript but, I think, by analogy, it would apply to a case where a Defendant who has private counsel, seeks funds to utilize for an expert in this case. I'll not, since, as I understand it, Mr. Mazelis is privately retained – You haven't been referred as – this case by the Public Defender and this is not a Panel case if I can use that term and that may not be the correct term – you're privately engaged in this case.

MR. MAZELIS: That is correct, Your Honor.

THE COURT: And I would not direct the Office of Public Defender to provide fees in this case since they are not counsel of record in the case. So, I'll specifically deny your request.

MR. MAZELIS: Thank you, Your Honor.

THE COURT: May I then excuse Ms. Hanson?

MR. MAZELIS: Yes.

THE COURT: She's welcome to remain here, but –

MS. HANSON: Thank You, Your honor.

THE COURT: You may be excused. Thank You.

APPENDIX E

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or

rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Maryland Code, Article 27A, § 1

It is hereby declared to be the policy of the State of Maryland to provide for the realization of the constitutional guarantees of counsel in the representation of indigents, including related necessary services and facilities, in criminal and juvenile proceedings within the State, and to assure effective assistance and continuity of counsel to indigent accused taken into custody and indigent defendants in criminal and juvenile proceedings before the courts of the State of Maryland, and to authorize the Office of Public Defender to administer and assure enforcement of the provisions of this article in accordance with its terms.

Maryland Code, Article 27A, § 2

(a) In general. -- For the purposes of this article, the following terms shall have the meanings ascribed to them in this section.

(b) Office. -- "Office" means the Office of Public Defender, including district offices of the Public Defender and such branch offices as are deemed necessary and hereinafter described.

(c) District. -- "District" means an area comprising one or more political subdivisions conforming to the geographic boundaries of the District Court districts established in § 1-602 of the Courts Article of the Code.

(d) District public defender. -- "District public defender" means the district public defender of each of the various districts described in subsection (c) of this section.

(e) Panel attorney. -- "Panel attorney" means any attorney licensed to practice law in the State of Maryland and who qualifies and is eligible for appointment as counsel to an indigent person as defined by this article.

(f) Indigent. -- "Indigent" means any person taken into custody or charged with a serious crime as herein defined under the laws of the State of Maryland or the laws and ordinances of any county, municipality, or Baltimore City, who under oath or affirmation subscribes and states in writing that he is financially unable, without undue hardship, to provide for the full payment of an attorney and all other necessary expenses of legal representation.

(g) Expenses. -- "Expenses", when used with reference to representation under this article, means all costs incident to

investigation, other pretrial preparation, trial and appeal of a person accused of a serious crime.

(h) Serious crime. -- "Serious crime" means:

(1) A felony;

(2) A misdemeanor or offense, the penalty for which involves the possibility of confinement for more than three months or a fine of more than $ 500, or any other offense where, in the opinion of the court, either the complexity of the matter, or the youth, inexperience, or mental capacity of the accused, may require representation of the accused by an attorney; and

(3) An act that, except for the age of the person involved, would otherwise be a serious crime.

Maryland Code, Article 27A, § 4

(a) In general. -- It shall be the primary duty of the Public Defender to provide legal representation for any indigent defendant eligible for services under this article. Legal representation may be provided by the Public Defender, or, subject to the supervision of the Public Defender, by his deputy, by district public defenders, by assistant public defenders, or by panel attorneys as hereinafter provided for.

(b) Included proceedings. -- Legal representation shall be provided indigent defendants or parties in the following proceedings:

(1) Any criminal or juvenile proceeding constitutionally requiring the presence of counsel prior to presentment before a commissioner or judge;

(2) Criminal or juvenile proceedings, where the defendant is charged with a serious crime, before the District Court of Maryland, the various circuit courts within the State of Maryland, and the Court of Special Appeals;

(3) Postconviction proceedings, when the defendant has a right to counsel pursuant to Title 7 of the Criminal Procedure Article;

(4) Any other proceeding where possible incarceration pursuant to a judicial commitment of individuals in institutions of a public or private nature may result; and

(5) An involuntary termination of parental rights proceeding or a hearing under § 5-319 of the Family Law Article, if the party is entitled to Public Defender representation under § 5-323 of the Family Law Article.

(c) Applicability of article; federal issues. -- This article applies only to representation in or with respect to the courts of this State. It does not prohibit the Public Defender's Office from representing an indigent person in a federal court of the United States at federal expense, if the matter arises out of, or is related to, an action pending or recently pending in a court of criminal jurisdiction of this State. Any compensation paid by the federal court to the Public Defender, his deputy, district public defenders, or assistant public defenders shall be remitted to the general funds of the State.

(d) Extension of representation to all stages in proceedings. -- Representation by the Office of the Public Defender, or by an attorney appointed by the Office of the Public Defender, shall extend to all stages in the proceedings, including custody, interrogation, preliminary hearing, arraignment, trial, a hearing in an involuntary termination of parental rights proceeding, a hearing under § 5-319 of the Family Law Article, and appeal, if any, and shall continue until the final disposition of the cause, or until the assigned attorney is relieved by the Public Defender or by order of the court in which the cause is pending.

Maryland Code, Article 27A, § 7

(a) Determination of eligibility for services. -- Eligibility for the services of the Office of the Public Defender shall be determined on the basis of the need of the person seeking legal representation. Need shall be measured according to the financial ability of the person to engage and compensate competent private counsel and to provide all other necessary expenses of representation. Such ability shall be recognized to be a variable depending on the nature, extent and liquidity of assets; the disposable net income of the defendant; the nature of the offense; the effort and skill required to gather pertinent information; the length and complexity of the proceedings; and any other foreseeable expenses. In the event that a determination of eligibility cannot be made before the time when the first services are to be rendered, the office may undertake representation of an indigent person provisionally, and if it shall subsequently determine that the person is ineligible, it shall so inform the person, and the person shall thereupon be obliged to engage his own counsel and to reimburse the office for the cost of the services rendered to that time.

(b) Investigation of financial status of defendant. -- The Office of the Public Defender shall make such investigation of the financial status of each defendant at such time or times as the circumstances shall warrant, and in connection therewith the office shall have the authority to require a defendant to execute and deliver such written requests or authorizations as may be necessary under applicable law to provide the office with access to records of public or private sources, otherwise confidential, as may be needed to evaluate eligibility. The office is authorized to obtain information from any public record office of the State or of any subdivision or agency thereof upon request and without payment of any fees ordinarily required by law.

(c) Reimbursement of reasonable amount by defendant. -- In all cases where it appears that the defendant has or reasonably expects to have means to meet some part of the expenses for services rendered to him, he shall be required to reimburse the office, either by a single payment or in installments, in such amounts as he can reasonably be expected to pay; but no default or failure in the making of any such payment shall affect or reduce the rendering of services to him.

(d) Reasonable value of services constitutes lien. -- The reasonable value of the services rendered to a defendant pursuant to this article shall constitute a lien on any and all real property or personalty in which the defendant shall have or acquire an interest, except for the residence of the defendant. To perfect such lien, the Public Defender shall submit to the court having jurisdiction in the matter an affidavit setting forth the services rendered to the defendant and the reasonable value thereof. The court shall set a hearing date and shall notify the defendant of the date and the fact that an affidavit was filed by the Public Defender. The defendant may appear and may be represented by counsel, present evidence, and examine witnesses. The defendant may contest the filing of the affidavit to perfect a lien by the Public Defender for the reasonable value of the services rendered. If the court determines that the Public Defender is not entitled to a lien, the proceeding shall be dismissed. If the court determines that the Public Defender is entitled to a lien for services rendered to the defendant, the court shall determine and adjudge the reasonable value of said services. Upon adjudication, a lien shall be filed or docketed with the clerk of the circuit court or District Court where the services were performed or where the defendant works or resides, and from the date thereof shall constitute a lien on the defendant's property for a period of 10 years

unless sooner discharged and, except for such time limitation, shall have the force and effect of a judgment at law.

(e) Recording of lien. -- The clerks of the circuit courts and the District Court throughout the State shall provide separate books for the recording of said liens, which books shall be properly indexed in the name of the debtor. The Public Defender shall not be required to pay filing or recording fees.

(f) Collection effort by Department of Budget and Management. -- The Department of Budget and Management, central collection unit, on behalf of the Public Defender and in the name of the State shall do all things necessary and proper to collect all moneys due to the State by way of reimbursement for services rendered pursuant to this article.

(g) Order of reimbursement by court exercising criminal jurisdiction. -- A court exercising criminal jurisdiction shall order a defendant to reimburse the State for services rendered to the defendant by the Public Defender as a term or condition of any sentence, judgment, or probation imposed by it unless the court affirmatively finds that the defendant does not have the ability to make such reimbursement and waives the term or condition. The amount, time, and method of payment shall be established by the court. In all other cases of reimbursement for services rendered, collection shall be made in accordance with subsection (f) of this section.

(h) Order of reimbursement by court exercising other than criminal jurisdiction. --

(1) (i) A court exercising other than criminal jurisdiction shall order an individual represented by the Public Defender to reimburse the State for the reasonable value of services

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rendered to the individual by the Public Defender in an amount that the individual may reasonably be able to pay.

(ii) If the individual represented by the Public Defender is a minor, the court shall order the parents, guardian, or custodian of the minor to reimburse the State for the reasonable value of services rendered to the individual by the Public Defender in an amount that the parents, guardian, or custodian may reasonably be able to pay.

(2) Before ordering reimbursement under this subsection, a court shall grant an opportunity to be heard to the individual or the parents, guardian, or custodian of a minor.

(3) The court shall establish the amount to be paid, the method of payment, and the time that payment is to be paid.

Maryland Rule 1-325
Filing fees and costs -- Indigency.

(a) **Generally.** A person unable by reason of poverty to pay any filing fee or other court costs ordinarily required to be prepaid may file a request for an order waiving the prepayment of those costs. The person shall file with the request an affidavit verifying the facts set forth in that person's pleading, notice of appeal, application for leave to appeal or request for process, and stating the grounds for entitlement to the waiver. If the person is represented by an attorney, the request and affidavit shall be accompanied by the attorney's signed certification that the claim, appeal, application, or request for process is meritorious. The court shall review the papers presented and may require the person to supplement or explain any of the matters set forth in the papers. If the court is satisfied that the person is unable by reason of poverty to pay the filing fee or other court costs ordinarily required to be prepaid and the claim, appeal, application, or request for process is not frivolous, it shall waive by order the prepayment of such costs.

(b) **Appeals where public defender representation denied -- Payment by State.** The court shall order the State to pay the court costs related to an appeal or an application for leave to appeal and the costs of preparing any transcript of testimony, brief, appendices, and record extract necessary in connection with the appeal, in any case in which (1) the Public Defender's Office is authorized by these rules or other law to represent a party, (2) the Public Defender has declined representation of the party, and (3) the party is unable by reason of poverty to pay those costs.

Supreme Court, U.S.
FILED
JUL 7 - 2006
OFFICE OF THE CLERK

No. 05-1411

IN THE

Supreme Court of the United States

FREDERIC JAMES MOORE,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

On Petition For Writ of Certiorari
To The Court of Appeals of Maryland

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

KATHRYN GRILL GRAEFF*
DIANE E. KELLER
Assistant Attorneys General

Office of the Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6422

Counsel for Petitioner

**Counsel of Record*

QUESTIONS PRESENTED

1. Where Moore retained private counsel using his own funds and then sought public funding to obtain the trial testimony of his DNA expert, did the Maryland Court of Appeals correctly hold that there was no violation of his constitutional rights because state-funded expert assistance was available to any criminal defendant who has satisfied the state procedural requirement of applying for representation by the Maryland Office of the Public Defender and showing a need for such assistance?

2. Is Moore precluded from raising before this Court a challenge to the waiver of his right to state-funded expert assistance where the question of the validity of his waiver was neither presented to nor addressed by Maryland courts?

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BRIEF IN OPPOSITION

Respondent, the State of Maryland, respectfully requests that this Court deny the petition for writ of certiorari of Petitioner, Frederick James Moore.

OPINIONS BELOW

The reported opinion of the Maryland Court of Appeals, *Frederick James Moore v. State of Maryland*, 390 Md. 343, 889 A.2d 325 (2005), is reproduced in the appendix to the petition for writ of certiorari at Pet. App. 1a-84a. The Court of Appeals' order denying reconsideration, including the mandate, is reproduced in the appendix to the petition at Pet. App. 1b-3b. The reported opinion of the Maryland Court of Special Appeals, *Moore v. State*, 154 Md. App. 578, 841 A.2d 31 (2004), is reproduced in the appendix to the petition at Pet. App. 1c-30c. The transcript of pertinent portions of the proceeding before the Circuit Court for Howard County, Maryland, denying requested relief, is reproduced in the appendix to the petition at Pet. App. 1d-9d.

STATEMENT OF JURISDICTION

Petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth and Fourteenth Amendments to the United States Constitution, Sections 1, 2, 4 and 7 of Article 27A of the Maryland Code, and Maryland Rule 1-325(b) are

reproduced in the appendix to the petition at App. 1e-13e. Maryland Rules 8-131 and 8-303 are reproduced in the Appendix herein.

STATEMENT OF THE CASE

On January 4, 2001, Petitioner Moore and his co-defendant, Scott Jory Brill, were indicted for the first degree murder of fourteen-year-old Ashley Nicole Mason. (Pet. App. 3a-4a, 1c). Mason's body was found in the woods near a Pizza Hut parking lot. She had been stabbed multiple times and strangled. (Pet. App. 3a, 3c). Moore and Brill were tried separately. Moore was represented throughout his trial by an attorney he retained using money he had received from the settlement of a personal injury lawsuit. (Pet. App. 5a n.3).

Moore's Pretrial Request for Public Funds

Prior to trial, the State hired Cellmark Diagnostics, Inc. to conduct DNA analysis of evidence related to Mason's murder. (Pet. App. 1a, 3c). Moore then retained his own DNA expert, J. Thomas McClintock, Ph.D., paying him $1,000 obtained from Moore's mother, to review the Cellmark findings. (Pet. App. 5a). Dr. McClintock provided a preliminary analysis of the Cellmark procedures and results to the defense, but would not testify at trial without additional payment. (Pet. App. 6a, 3c). Moore filed "Defendant's Motion to Have the Circuit Court for Howard County or the Office of the Public Defender Provide Financial Aid to the Defendant for the Purpose of Providing a DNA Expert to Testify for the

Defendant." (Pet. App. 5a). Moore did not allege any specific errors in Cellmark's DNA analysis, but wanted his own expert to explain to the jury the general limitations of, or potential for mistakes in, DNA testing. (Pet. App. 6a-7a). In Moore's view, the expert "would be extremely important to help explain to the jury that there are two sides to every DNA test result." (Pet. App. 6a).

Moore declared in support of his motion that he was indigent. He presented no evidence establishing the amount of money he had received in the personal injury settlement, nor did he establish how much money had been set aside for his defense or how much money remained available from the settlement for that purpose. (Pet. App. 4c). The Court of Appeals declared that, for the purposes of the pretrial motion, Moore was conceded to be indigent. (Pet. App. 1a).[1]

At a January 14, 2002, hearing on the motion, a representative of the Office of the Public Defender [O.P.D.] testified that the Office policy was not to make funds available for private counsel cases. (Pet. App. 9a). The trial court also consulted with the administrative judge for Howard County and determined "that there are no Court funds dedicated or available to provide in general

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[1] Maryland did not take a position prior to trial on Moore's request for funds provided by the Office of the Public Defender or the Circuit Court for Howard County, instead deferring to the trial court. (Pet. App. 9a). On appeal, however, the State argued "that Moore bore the burden of establishing indigency but failed to do so." (Pet. App. 16a).

for experts in cases where an individual will have private counsel and, specifically, there are not funds available – Court funds available to provide for the expert in this case." (*Id.*). After confirming that Moore's counsel was privately retained, the court added: "And I would not direct the Office of the Public Defender to provide fees in this case since they are not counsel of record in the case. So, I'll specifically deny your request." (Pet. App. 10a).

The Evidence at Trial

The State presented evidence that, on the night before her body was discovered, Ashley Mason had accompanied Moore and his co-defendant, Brill, to the house of Martise Stewart. (Pet. App. 12a, 2c). There, an altercation developed, first between Mason and Brill and then between Mason and both men. (Pet. App. 12a). Stewart testified that Brill punched Mason in the face and Moore exclaimed: "'Just go ahead and hit the bitch, man. Hit her.'" (*Id.*). Stewart went upstairs at this point, but heard a loud commotion continue. He "later saw Mason leave with Moore and Brill." (*Id.*).

Moore and Brill returned to Stewart's house a few hours later. Moore's "butter Timberland" boots and pants legs were smeared with blood, and the "do-rag" or head scarf that Moore had been wearing when he left the house was missing. (*Id.*). Brill had lacerations on both arms. Moore and Brill described the killing to Stewart. The Court of Appeals summarized Stewart's testimony on this point, saying:

> Brill "indicated they killed her," and said that Mason had caused his lacerations by scratching him as he choked her. Moore "said they both had killed her and they put her behind the Pizza Hut . . . . Moore also said that they had used a buck knife and that "he threw the knife and he couldn't find it." Moore told Stewart that "it was almost like daylight outside, but he said he would've definitely recovered the weapon, but he couldn't like, find where he threw it at."

(Pet. App. 13a)(footnote omitted).

A bloody knife was discovered near the Pizza Hut, and two "do-rags" were recovered from the bushes near Mason's body. (Pet. App. 10a). Scott Brill's sister, Crystal Brill, identified photographs of the knife as those of a knife she had given Moore, adding that Moore carried the knife in his pocket. (Pet. App. 12a-13a). Crystal Brill also testified that the two "do-rags" found near the victim's body belonged to Moore and that he wore the two simultaneously because one had a rip. (Pet. App. 13a). She confirmed that Moore wore "butter Timberland" boots before the murder, but stated that she never saw him wear these boots after the victim was killed. In addition, Crystal Brill testified that she observed Moore wiping down portions of Scott Brill's car after the murder. (*Id.*).

Danielle Ritter, Moore's cousin and the mother of Scott Brill's child, testified that Moore told her "what had happened" some weeks after the murder. (*Id.*). On direct examination, "[a]fter some prodding by the State, Ritter

testified that Moore had said 'we' killed her." (Pet. App. 14a). On cross-examination, Ritter agreed that Moore never said who stabbed the victim. (*Id.*).

The State presented evidence that DNA analysis was performed by the Cellmark laboratory on blood recovered from the Pizza Hut parking lot, the victim's underwear, the "do-rags" recovered near the victim's body, the knife discovered near the Pizza Hut, clippings from the victim's fingernails, and swabs taken from her ankles, vagina and anus. (Pet. App. 10a-11a). The Court of Appeals summarized the testimony of Dr. Robin Cotton, forensic lab director for Cellmark:

> DNA on each of the "do-rags" was consistent with Frederick Moore's at each of the nine loci tested. Within Moore's racial category, only one individual in 79 billion could be expected to exhibit that particular DNA profile. DNA obtained from the inside of the knife was consistent with that of Ashley Mason; DNA obtained from the outside of the knife came from multiple sources. Moore was identified as a possible contributor at six of the nine loci; the outside of the knife was inconclusive as to Brill. The fingernail clippings from Ashley Mason's right and left hands both revealed a mixture of DNA, with Ashley Mason identified as the primary source. There were also indications of a male as a possible source, but no further conclusion could be made. Swabs from Mason's left ankle showed a mixture of DNA, with no primary source. Brill was included as a possible

> source, while Moore was excluded as a source. Swabs from Mason's right ankle also revealed a mixture of DNA, with Mason herself as the primary source. The secondary DNA was inconclusive as to Moore and as to Brill, with both men included at four of the nine loci.

(Pet. App. 11a). Although Moore was not charged with any sexual offense, the Court of Appeals also summarized Dr. Cotton's testimony regarding the results of the DNA testing of samples taken from the victim's vagina and anus and from her underpants:

> The vaginal swabs yielded both sperm fractions and non-sperm fractions. The sperm fractions indicated the presence of male DNA, but no further conclusions could be drawn. Sperm fractions recovered from the anal swabs revealed that Moore could be included as a possible source at five of the nine loci; no conclusion could be reached on the remaining four loci. A comparison with Scott Brill's DNA was inconclusive. Sperm fractions recovered from Mason's underwear revealed a mixture of at least two sources. Although no primary source was determined, Frederick Moore was included as a possible contributor at all nine loci. Within Moore's racial category, approximately one individual in 40,000 could have contributed these sperm fractions.

(Pet. App. 11a-12a)(footnote omitted).

Moore did not testify at trial. Before the jury, Moore's counsel acknowledged that Moore was present during the killing, but argued that Brill alone committed the murder. (Pet. App. 10a).

On February 1, 2002, a jury convicted Moore of first degree murder. He was sentenced to life imprisonment on August 21, 2002. (Pet. App. 1c-2c).

The Decisions on Appeal

The Court of Special Appeals of Maryland affirmed the judgment on direct appeal. (Pet. App. 1c-30c). The Court of Appeals of Maryland granted Moore's petition for writ of certiorari and likewise affirmed. The Court of Appeals agreed with Moore that the scope of the right to expert assistance announced in *Ake v. Oklahoma*, 470 U.S. 68 (1985), was not restricted to capital cases or to psychiatric experts. (Pet. App. 21a-26a). To obtain expert assistance using public funds, Maryland's highest court stated, a defendant must show "that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial." (Pet. App. at 27a-29a). Upon timely request, the defendant is entitled to an *ex parte* hearing to determine whether he has satisfied this burden. (Pet. App. 32a).

The Court of Appeals held that, as a matter of Maryland statutory law, representation by the Maryland Office of the Public Defender is not severable from ancillary services provided pursuant to statute. (Pet. App.

33a-36a). Addressing Moore's due process, equal protection and Sixth Amendment right to counsel claims, the court held that the State had satisfied its constitutional obligations by establishing the Office of the Public Defender, "making expert services available to clients of that Office, and requiring that, in order for an indigent to receive State-funded expert services, the defendant *must* seek representation by O.P.D." (Pet. App. 36a).

In his briefs and argument before the Court of Appeals, Moore presented no question regarding the validity of his waiver of his alleged right to a state-funded expert. (Pet. App. 1a-2a: listing questions presented by Moore). Despite his failure properly to present the claim, however, after the Court of Appeals had affirmed the judgment, Moore moved for reconsideration, challenging the validity of his waiver of his constitutional right to expert assistance and asking the court to address the issue. By Order issued February 3, 2006, the Court of Appeals summarily denied the motion for reconsideration. (Pet. App. 1b).

REASONS FOR DENYING THE WRIT

SUMMARY

There are several reasons why certiorari should not be granted to address Moore's claim that his Fourteenth Amendment rights to due process and equal protection and his Sixth Amendment right to counsel entitled him to state-funded expert assistance, notwithstanding that he was represented by privately retained counsel. First, a criminal defendant's right to expert assistance, established in *Ake*

v. Oklahoma, 470 U.S. 68 (1985), does not apply to cases like that at bar, where DNA testing was performed and the methodology of the scientific analysis was well established and objective. Second, the Court of Appeals correctly determined that Maryland had satisfied its constitutional obligations by making access to State-funded expert assistance contingent upon satisfaction of the state procedural requirement of application to the O.P.D. Third, the Constitution permits states to adopt alternative methods for implementing access to ancillary services. Thus, there is no split among the states requiring resolution by this Court. Finally, and in any event, Moore failed to establish a need for the requested assistance.

Moore's second claim, challenging the validity of his waiver of his alleged right to expert assistance under *Ake*, was not properly presented to nor addressed by Maryland courts. Having failed to comply with Maryland's requirements for presentation of the claim, Moore should not be granted review of the claim by this Court.

I.

THERE IS NO NEED FOR REVIEW BY THIS COURT OF MOORE'S DEMAND FOR STATE-FUNDED EXPERT ASSISTANCE WHEN HE WAS REPRESENTED BY A PRIVATE ATTORNEY USING HIS OWN FUNDS.

A. *Ake v. Oklahoma* does not establish a right to expert assistance under the circumstances of this case.

In *Ake v. Oklahoma*, this Court held as a matter of due process

> that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

470 U.S. at 83. The Maryland Court of Appeals erred in expanding the scope of *Ake*.

Ake, who was facing capital murder charges, attempted to raise an insanity defense, yet "*there was no expert testimony for either side on [his] sanity at the time of the offense.*" 470 U.S. at 72 (emphasis in original). By contrast, here, DNA analysis was performed. *See Granviel v. Lynaugh*, 881 F.2d 185, 191 (5th Cir. 1989)(holding that

defendant's Fourteenth Amendment right was satisfied where opinion and testimony of court-appointed psychiatrist was available to both sides), *cert. denied*, 495 U.S. 963 (1990).

This case is also unlike *Ake* in that Moore was not facing a death sentence and psychiatric evaluation was not involved. *Ake* should not be applied to the case at bar, where the methodology of the DNA testing used by Cellmark is well established and much less subjective than a psychiatric evaluation. *See Harrison v. State*, 644 N.E.2d 1243, 1252-53 (Ind. 1995)(upholding denial of DNA expert to defense at public expense, provided analysis was performed by neutral expert, because DNA analysis involved precise physical measurements, the results of which were not subject to dispute); *cf. Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985)(leaving open question of whether due process requires states to provide non-psychiatric scientific experts under appropriate showing of need). Even if *Ake*'s analysis may be applied to the trial testimony of a DNA expert, however, the Court of Appeals correctly determined that there was no due process or other constitutional violation in this case.

B. Maryland satisfies its constitutional obligations by granting indigent criminal defendants access to state funded expert assistance, provided the defendant complies with state procedural requirements by applying to the Office of the Public Defender.

As Maryland's Court of Appeals observed, "[i]t is clear that *Ake* does not mandate handing over the State's

checkbook to indigent defendants and their attorneys." (Pet. App. 27a). Through the Office of the Public Defender, Maryland not only provides legal representation for any criminal defendant eligible for its services; the State also provides such defendants any "related necessary services." Md. Code Ann., Art. 27A, § 1 (2003 Repl. Vol.); *see also State v. Miller*, 337 Md. 71, 77-78, 651 A.2d 845, 847-48 (1994); *accord Miller v. Smith*, 115 F.3d 1136, 1141-43 (4th Cir.)(en banc)(holding, on habeas corpus review, that Maryland did not violate Sixth or Fourteenth Amendments in denying defendant, who was represented by *pro bono* attorney, free trial transcript for use on appeal; stating that Miller could have received representation by O.P.D. had he applied for same and that Maryland did not deny him meaningful appellate review by requiring in Md. Rule 1-325(b) that indigent defendant must first apply for legal representation with O.P.D. as prerequisite to obtaining free transcript), *cert. denicd*, 522 U.S. 884 (1997). In this case, the Court of Appeals, construing Maryland's Public Defender Act, held as a matter of state law that representation by the O.P.D. is not severable from access to ancillary services. (Pet. App. 33a-36a). Moore insists that his claim should be resolved by concluding that Article 27A "permits, and the Constitution requires, that he be granted the requested funding while proceeding with retained counsel." (Pet. for Cert. at 22 n.11). To the contrary, the Court of Appeals correctly held that Maryland had satisfied its constitutional obligations by making ancillary services available to any indigent criminal defendant who applied for representation by the Office of the Public Defender.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires a state, upon request, to provide indigent criminal defendants with the "basic tools of an adequate defense . . . when those tools are available for a price to other prisoners." *Britt v. North Carolina*, 404 U.S. 226, 227 (1971). The state is not required to purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, however; fundamental fairness requires only that the state not deny indigent defendants "an adequate opportunity to present their claims fairly within the adversary system." *Ross v. Moffitt*, 417 U.S. 600, 612 (1974).

In *Ake*, this Court held that, where a defendant's sanity at the time of an offense will be a significant factor at trial, the State must assure the defendant access to a competent psychiatrist to assist in his defense, but the Court added:

> This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the State the decision how to implement this right.

470 U.S. at 83.

This Court has also recognized that states may create reasonable alternative systems in satisfaction of a criminal

defendant's right to equal protection. *See Bounds v. Smith*, 430 U.S. 817, 830-31 (1977)(noting that, while adequate law libraries are one constitutionally acceptable method of assuring meaningful access to the courts in accordance with equal protection guarantees, alternative means may be adopted to achieve this goal); *Britt v. North Carolina*, 404 U.S. at 229-30 (holding that equal protection concerns were satisfied where accused did not receive transcript of first trial, but where informal alternative was available). The Court of Appeals correctly determined that there is no equal protection violation where a defendant is denied access to certain trial resources because of his own failure to comply with reasonable state procedural requirements. (Pet. App. 39a).

With respect to Moore's claim that the Court of Appeals improperly circumscribed his Sixth Amendment right to counsel of his choice as described in *Wheat v. United States*, 486 U.S. 153 (1988), this Court has remarked that "[t]he Sixth Amendment right to choose one's own counsel is circumscribed in several important respects." *Wheat*, 486 U.S. at 159. While a defendant who does not require appointed counsel has the right to choose who will represent him, *United States v. Gonzales-Lopez*, No. 05-352, 2006 WL 1725573 at *3 (U.S. June 26, 2006), it is firmly established that an indigent defendant does not have a right to insist on representation by the particular counsel of his choice. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989); *Wheat*, 486 U.S. at 159. A similar analysis should apply to defendants who are seeking money for expert assistance from the public coffers: defendants cannot insist upon

counsel of their choice while demanding state-funded expert assistance.

The Court of Appeals correctly concluded that

> [a]ssuming *arguendo* that the assistance of a DNA expert was necessary to an adequate defense in the instant case, the State did not deny Moore that assistance. Rather, expert assistance was available to him so long as he complied with the procedural requirement that he apply for legal representation through the O.P.D. Imposing this requirement on Moore did not violate his constitutional rights.

(Pet. App. 41a-42a). As the court stated: "Indigent defendants may utilize the O.P.D.'s complete 'package' of services, or forgo them entirely. While such defendants may face difficult choices, the Constitution does not bar the State of Maryland from requiring them to choose between counsel of their choice and ancillary services provided by the O.P.D." (Pet. App. 41a).

C. Because the Constitution permits states to adopt alternative methods for implementing access to ancillary services, there is no split among the states requiring resolution by this Court.

Moore suggests that certiorari should be granted to resolve an evenly divided split among state courts of last resort. (Pet. for Cert. at 12). In his initial petition, he discusses three states–Iowa, Louisiana and Nevada–in which the courts of last resort have held as a matter of

federal constitutional law that indigent defendants are entitled to public funding for expert assistance when they are not represented by the state Public Defender, and contrasts the decisions in these three states with contrary holdings in Kentucky, Delaware and Maryland. (Pet. for Cert. at 15-20).

Because the Constitution permits the states to adopt alternative methods for implementing access to ancillary services, there is no split requiring resolution by this Court. Furthermore, the opinions from Iowa, Louisiana and Nevada contain little, if any, constitutional analysis. In *English v. Missildine*, 311 N.W.2d 292, 294 (Iowa 1981), the Supreme Court of Iowa simply declared that "[t]he Constitution does not limit [the Sixth Amendment right to counsel] to defendants represented by appointed or assigned counsel." With virtually no additional analysis of the constitutional claim, the court declared that "the determinative question is the defendant's indigency" and stated that "[t]he fact that a third person retained private counsel for plaintiff does not by itself affect his status as an indigent." *Id.* The court did reject the State's contention that the defendant's remedy was to accept court appointed or assigned counsel; however, the court did so based on the court's view that such a requirement "would impose an unreasonable and unnecessary additional burden on the public treasury." *Id.* At bottom, this is a policy determination, properly made by the state legislature.

In *Widdis v. Second Judicial District Court*, 968 P.2d 1165, 1168 (Nev. 1998), the Supreme Court of Nevada

merely adopted the "analytical framework" of *English v. Missildine*. Like the *English* court, the Nevada court then went on to discuss policy rationales, concluding that "a contrary rule would have a greater negative impact on scarce public resources by creating disincentives for defendants to seek private representation at their own expense." *Id.* at 1229. Again, this policy determination is best made by the legislative body of each state.

State v. Touchet, 642 So. 2d 1213, 1213-14 (La. 1994), addressed "whether and to what extent indigent defendants are entitled to ex parte hearings on their motion for state funding of expert witness services." In answering this question, the Supreme Court of Louisiana looked to due process principles and set forth the test for determining when an indigent defendant should be granted such services. *Id.* at 1214-17.[2] Later, in *State v. Jones*, 707 So. 2d 975, 977-78 (La. 1998), the court determined that a defendant who had private counsel provided by a collateral source "may still be entitled to State funding for auxilary services provided he can meet the requirements of *Touchet*." *Jones*, in turn, was cited in *State v. Frank*, 803 So. 2d 1, 8-11 (La. 2001), where the court reversed a

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[2] The Louisiana court held in *Touchet* that "for an indigent defendant to be granted the services of an expert at the expense of the state, he must establish that there exists a reasonable probability both that an expert would be of assistance to the defense and that the denial of expert assistance would result in a fundamentally unfair trial." 642 So. 2d at 1216. This is the same formulation adopted by Maryland's Court of Appeals. (Pet. App. 27a-29a).

lower court finding that the defendant was not indigent and then considered what prejudice, if any, the defendant had suffered from the lack of additional expert assistance.

In none of these cases did a defendant retain private counsel using his own funds. *See English v. Missildine*, 311 N.W.2d at 293 (defendant's mother retained private counsel); *State v. Frank*, 803 So. 2d at 6 (defendant's mother retained counsel); *State v. Jones*, 707 So. 2d at 976 (defendant's father paid second attorney to join public defender as counsel); *Widdis v. State*, 968 P.2d at 1166 (family members paid for private counsel).[3] Indeed, in *English v. Missildine*, the Supreme Court of Iowa observed that this was "not a case where an accused has rendered himself impecunious by an unreasonable expenditure of funds to retain private counsel. Nor is it a case where counsel's fee should reasonably be expected to cover investigative services." 311 N.W.2d at 294. To like effect, in *Jones*, after stating that the a defendant's indigency was the determinative question, not whether the defendant had derived any assistance from collateral sources, the Supreme Court of Louisiana added: "Of course, a defendant who retains counsel at his own expense has not derived that benefit from a collateral source and therefore his indigent status must be questioned." 707 So. 2d at 977. In short, none of the cases from Iowa, Nevada or Louisiana is directly on point with the circumstances in the case at bar.

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[3] In *State v. Touchet*, 642 So. 2d at 1213-14, no information is provided regarding the source of funding for defendant's counsel's.

The cases from Washington and New Mexico, which are discussed in Moore's supplemental petition, are also inapposite. In *State v. Punsalan*, 133 P.3d 934, 935 (Wa. 2006), the defendant's mother hired a private attorney on his behalf; that attorney then sought public funds through the King County Office of the Public Defender to retain a forensic pathologist. The Supreme Court of Washington resolved Punsalan's claim as a matter of state law, looking to the plain language of the pertinent statute to hold that indigent criminal defendants represented by private counsel were entitled to state-funded expert assistance. *Id.* at 935-36. The case does not support Moore's assertion, (Supp. Pet. at 1), that there is a "growing divide among state courts" on a federal question.

In *State v. Brown*, 134 P.3d 753, 758 (N.M. 2006), the Supreme Court of New Mexico considered whether the right of indigent defendants to expert witnesses includes the right to funding to pay for those witnesses when the defendant is represented by a *pro bono* attorney. Again, the case is not on point. The New Mexico court expressly distinguished the circumstances of the case before it from those presented in *Subin v. Ulmer*, 36 P.3d 441 (N.M. Ct. App. 2001), on the ground that Brown's counsel served *pro bono*, while *Subin* "addressed the situation in which the defendant, although indigent, nonetheless retained *paid* private counsel and was therefore not entitled to receive" funding from the state public defender's office. 134 P.3d at 759. The court held "that constitutional considerations, together with the particular statutory framework in New Mexico and the important policy interests at stake, mandate that a defendant, established as indigent and

represented by *pro bono* counsel, be afforded the same access to expert witness funding as other defendants represented by the [public defender's office]." *Id.* at 760-61. Moore is not represented by *pro bono* counsel. Consequently, his case falls outside the ambit of the holding in *Brown*. Neither *Brown* nor *Punsalan* supports Moore's assertion of a need for review by this Court.

D. Moore failed to establish a need for the requested trial testimony of his DNA expert.

Unparticularized assertions of a need for expert assistance will not support a federal constitutional claim. *Caldwell v. Mississippi*, 472 U.S. at 323 n.1. Based on its holding that Moore had not satisfied Maryland's procedural requirement for state-funded expert assistance by applying to the O.P.D., the Court of Appeals did not reach the question of whether he had made the required showing that the services he requested were in fact necessary to an adequate defense. (Pet. App. 37a n.8). The record establishes, however, that Moore failed to demonstrate, as would be required in Maryland, that there was a reasonable probability "both that an expert would be of assistance to [his] defense and that the denial of expert assistance would result in a fundamentally unfair trial." (Pet. App. 28a-29a).[4]

[4] The record fails to demonstrate even that Moore was indigent: he did not indicate how much money had been paid for his defense or whether that sum might reasonably be expected to encompass the money necessary for expert witnesses. (Pet. App. 4c).

Moore had already obtained, at his own expense, an independent review of the DNA analysis conducted by Cellmark in this case and he had the benefit of this review in conducting his cross-examination of Dr. Cotton. Moore did not request additional testing, nor did he allege any specific errors in the analysis; instead, he merely sought his expert's trial testimony to explain general ways in which DNA testing may be flawed. (Pet. App. 5a-7a). Such general "possibilities" were plainly insufficient to establish a particularized need for testimony from a defense expert in this case, particularly where the defense expert had already examined Cellmark's results.

Moreover, this is not a case where DNA evidence was central to the State's case. Although as Moore observes, (Pet. for Cert. at 5), Dr. Cotton's testimony was more extensive than that of any other State witness, the length of her testimony reflects only the number of samples tested and the mixed results obtained on some of the samples, not the importance of the DNA evidence. The DNA evidence was essentially corroborative of other evidence presented by the State. It was certainly no surprise that the blood at the crime scene was that of the victim. Moore, through counsel, admitted his presence during the killing. (Pet. App. 10a). Moreover, compelling evidence apart from DNA established that the do-rags and knife found near the scene belonged to Moore. Thus, again, it was no surprise that his DNA appeared on these items. Moore was not charged with any sexual offense against the victim. Therefore, insofar as the DNA evidence indicated that Moore could be included as a source of the DNA on the victim's anal swabs and panties, such evidence had little,

if any, probative value regarding whether Moore participated in the murder.

In sum, Moore failed to establish any constitutional violation by the denial of his motion for public funds to obtain the trial testimony of his DNA expert. For all the reasons discussed above, Moore's request for certiorari review of his first claim should be denied.

II.

MOORE IS PRECLUDED FROM RAISING BEFORE THIS COURT A CHALLENGE TO THE WAIVER OF HIS RIGHT TO STATE FUNDED EXPERT ASSISTANCE WHERE THE QUESTION OF THE VALIDITY OF HIS WAIVER WAS NEITHER PRESENTED TO NOR ADDRESSED BY MARYLAND COURTS.

Moore's second question presented, regarding the validity of the waiver of his claimed constitutional right to expert assistance, was not properly presented to nor addressed by Maryland courts. Maryland does not concede either that such a waiver was necessary or that the facts of this case would not demonstrate a valid waiver. But, in any event, this Court should decline to review Moore's challenge to his waiver because he did not properly present this issue to state courts.

To support his assertion that he raised the claim before the Court of Appeals, Moore cites to page 34 of his brief

before that court. (Pet. for Cert. at 8). At page 34, Moore declared that the "rule" developed in Delaware would guarantee a knowing and intelligent waiver of the right to state funded expert assistance. Moore Ct. App. Br. 34. He concluded by stating that "[i]f [the Court of Appeals] should adopt such a rule, [he] must be granted a new trial and given the opportunity for the first time to exercise the counsel substitution option so he may proceed with a public defender and the necessary experts." *Id.* The Court of Appeals did not adopt what Moore termed "the Delaware Rule." Thus, the condition precedent for Moore's request was not satisfied. Even if this were not so, however, Moore's remarks on page 34 were inadequate to present his current claim.

Maryland's Court of Appeals generally will not consider an issue that was not raised or decided in the lower state courts. Md. Rule 8-131(a). In addition, Maryland Rule 8-303(b)(1)(F) requires that a petition for writ of certiorari contain the questions presented for review. Moore presented three questions to the Court of Appeals; none concerned the validity of any waiver. (Pet. App. 1a-2a: quoting questions presented by Moore for review). When Moore did at last present the waiver claim, in a motion for reconsideration of the Court of Appeals' decision affirming the judgment, the court summarily denied the motion, with no decision on the merits. (Pet. App. 1b).

This Court does not sit to resolve questions that were neither presented to nor passed on by the lower courts. *See United States v. Williams*, 504 U.S. 36, 44 n.5 (1992).

Under the circumstances here, where Moore failed to comply with Maryland's procedural rules governing preservation and presentation of his claim, this Court should decline to issue a writ of certiorari to review Moore's challenge to the validity of his waiver

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that the petition for writ of certiorari filed herein be denied.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

KATHRYN GRILL GRAEFF*
DIANE E. KELLER
Assistant Attorneys General

Counsel for Petitioner

**Counsel of Record*

July 7, 2006

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Rule 8-131. Scope of Review.

(a) *Generally.* The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

(b) *In Court of Appeals — Additional limitations.* (1) Prior appellate decision. Unless otherwise provided by the order granting the writ of certiorari, in reviewing a decision rendered by the Court of Special Appeals or by a circuit court acting in an appellate capacity, the Court of Appeals ordinarily will consider only an issue that has been raised in the petition for certiorari or any cross-petition and that has been preserved for review by the Court of Appeals. Whenever an issue raised in a petition for certiorari or a cross-petition involves, either expressly or implicitly, the assertion that the trial court committed error, the Court of Appeals may consider whether the error was harmless or non-prejudicial even though the matter of harm or prejudice was not raised in the petition or in a cross-petition.

(2) No prior appellate decision. Except as otherwise provided in Rule 8-304(c), when the Court of Appeals issues a writ of certiorari to review a case pending in the Court of Special Appeals before a decision has been rendered by that Court, the Court of Appeals will consider

those issues that would have been cognizable by the Court of Special Appeals.

(c) *Action tried without a jury.* When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

(d) *Interlocutory order.* On an appeal from a final judgment, an interlocutory order previously entered in the action is open to review by the Court unless an appeal has previously been taken from that order and decided on the merits by the Court.

(e) *Order denying motion to dismiss.* An order denying a motion to dismiss for failure to state a claim upon which relief can be granted is reviewable only on appeal from the judgment.

(2006 Rules)

Rule 8-303. Petition for writ of certiorari — procedure.

(a) *Filing.* A petition for a writ of certiorari, together with seven legible copies, shall be filed with the Clerk of the Court of Appeals. The petition shall be accompanied by the filing fee prescribed pursuant to Code, Courts Article, § 7-102 unless the fee has been waived by an order of court or unless the petitioner is represented by (1) the Public Defender's Office, (2) an attorney assigned by Legal Aid Bureau, Inc., or (3) an attorney assigned by

any other legal services organization that accepts as clients only those persons meeting the financial eligibility criteria established by the Federal Legal Services Corporation or other appropriate governmental agency.

(b) *Petition.* (1) Contents. The petition shall present accurately, briefly, and clearly whatever is essential to a ready and adequate understanding of the points requiring consideration. Except with the permission of the Court of Appeals, a petition shall not exceed 25 pages. It shall contain the following information:

(A) A reference to the action in the lower court by name and docket number;

(B) A statement whether the case has been decided by the Court of Special Appeals;

(C) If the case is then pending in the Court of Special Appeals, a statement whether briefs have been filed in that Court or the date briefs are due, if known;

(D) A statement whether the judgment of the circuit court has adjudicated all claims in the action in their entirety, and the rights and liabilities of all parties to the action;

(E) The date of the judgment sought to be reviewed and the date of any mandate of the Court of Special Appeals;

(F) The questions presented for review;

(G) A reference to pertinent constitutional provisions, statutes, ordinances, or regulations;

(H) A concise statement of the facts material to the consideration of the questions presented; and

(I) A concise argument in support of the petition.

(2) Documents. A copy of each of the following documents shall be submitted with the petition at the time it is filed:

(A) The docket entry evidencing the judgment of the circuit court;

(B) Any opinion of the circuit court;

(C) Any written order issued under Rule 2-602(b);

(D) If the case has not been decided by the Court of Special Appeals, all briefs that have been filed in the Court of Special Appeals; and

(E) Any opinion of the Court of Special Appeals.

(3) Where documents unavailable. If a document required by subsection (b)(2) of this Rule is unavailable, the petitioner shall state the reason for the unavailability. If a document required to be submitted with the petition becomes available after the petition is filed but before it has been acted upon, the petitioner shall file it as a supplement to the petition as soon as it becomes available.

(4) Previously served documents. Copies of any brief or opinion previously served upon or furnished to another party need not be served upon that party.

(c) *Sanction.* Failure to comply with section (b) of this Rule is a sufficient reason for denying the petition.

(d) *Answer.* Within 15 days after service of the petition, any other party may file an original and seven copies of an answer to the petition stating why the writ should be denied.

(e) *Stay of judgment of Court of Special Appeals or of a Circuit Court.* Upon the filing of a petition for a

writ of certiorari, or upon issuing a writ on its own motion, the Court of Appeals may stay the issuance, enforcement, or execution of a mandate of the Court of Special Appeals or the enforcement or execution of a judgment of a circuit court.

(f) *Disposition.* On review of the petition and any answer, the Court, unless otherwise ordered, shall grant or deny the petition without the submission of briefs or the hearing of argument. If the petition is granted, the Court shall:

(1) direct further proceedings in the Court of Appeals;

(2) dismiss the appeal pursuant to Rule 8-602;

(3) affirm the judgment of the lower court;

(4) vacate or reverse the judgment of the lower court;

(5) modify the judgment of the lower court;

(6) remand the action to the lower court for further proceedings pursuant to Rule 8-604 (d); or

(7) an appropriate combination of the above.

(g) *Duty of clerk.* The Clerk of the Court of Appeals shall send a copy of the order disposing of the petition to the clerk of the lower court. If the order directs issuance of a writ of certiorari, the Clerk shall issue the writ to the lower court.

(2006 Rules)

(1)

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IN THE

Supreme Court of the United States

FREDERICK JAMES MOORE,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

On Petition for a Writ of Certiorari To The Maryland Court of Appeals

PETITIONER'S SUPPLEMENTAL BRIEF

W. BRADLEY NEY
1200 New Hampshire Ave., N.W.
Washington, DC 20036
(202) 776-2280

ALBERT H. TURKUS
Counsel of Record
KENNETH W. GIDEON
JULIA M. KAZAKS
DONALD P. SALZMAN
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7000

Attorneys for Petitioner Frederick James Moore

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Petitioner Frederick James Moore files this supplemental brief pursuant to Rule 15.8 to inform the Court of three new authorities relevant to the disposition of his Petition for a Writ of Certiorari. Two more state courts of last resort have issued opinions addressing the first question presented in Moore's Petition. These new decisions add to the growing divide among state courts on the important federal question of whether an indigent criminal defendant represented by private counsel has a constitutional right to publicly funded expert assistance. Furthermore, this Court's June 26, 2006 decision in *United States v. Gonzalez-Lopez* highlights the importance of the right to retained counsel of one's choice – a right imperiled by the decision below and implicated by the growing body of state court law on this subject. All three authorities underscore the need for the Court to grant review in this case.

DISCUSSION

1. *New Mexico: State v. Brown*

In *State v. Brown*, 134 P.3d 753 (N.M. 2006), the New Mexico Supreme Court has now held that indigent criminal defendants represented by private pro bono counsel have the same constitutional right to necessary state-funded expert witnesses as defendants represented by a public defender.[1] Defendant William Brown was charged with three felonies. He retained private counsel and also applied for indigent defense services. A magistrate determined that Brown was indigent and assigned a public defender. The public defender entered an appearance but did not otherwise

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[1] This opinion was issued by the New Mexico Supreme Court on April 24, 2006, ten days before Moore's Petition For Certiorari was filed. However, the opinion was not available electronically on Lexis until May 25, 2006 or on Westlaw until June 14, 2006.

act on Brown's behalf.[2] When the case was bound over for trial, Brown's private counsel refunded his retainer and notified the court that he would represent Brown pro bono. *Id.* at 755.

Brown's counsel determined that experts were necessary for the defense and requested funds from the New Mexico Public Defender Department (the "Department"). The request was denied on grounds that Brown was not represented by the Department. Brown then petitioned the district court to order the Department to provide expert funding. Following a hearing, that request was also denied. *Id.* at 755-56.[3] However, the judge recognized the unsettled law surrounding this important issue and certified his order for interlocutory appeal.

The intermediate appellate court upheld the district court on the grounds that the district court lacked the authority to order the payment of expert fees where the defendant is represented by pro bono counsel. *Id.* at 756. The New Mexico Supreme Court reversed, basing its decision primarily on federal constitutional grounds.

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[2] Brown's private counsel was listed as the attorney of record on several subsequent documents and the court determined that Brown's private counsel had served as his counsel since his initial appearance. *Id.* at 755.

[3] The trial judge denied the request but informed Brown that if he "were to accept Department representation, he would receive attorney representation and an array of services . . . including expert witness fees; and if Brown wished to continue with private defense counsel, he would have to provide for his own expert witness fees." *Id.* at 756. The judge's effort to inform Brown of his options stands in stark contrast to Moore's case, where the record shows no effort by the court or anyone else to inform Moore of his rights, as Moore's second Question Presented addresses.

First, the court noted that "[t]he fundamental right to counsel . . . includes the right of a criminal defendant to the effective assistance of counsel . . . and the obligation of states 'to provide indigent prisoners with the basic tools of an adequate defense.'" *Id.* at 757 (citing *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980) and quoting *Britt v. N.C.*, 404 U.S. 226, 227 (1971)). The court emphasized that defendants are "entitled" to "both" protections and cannot be forced to choose between these two. *Brown*, 134 P.3d at 759. The court found that the initial appointment of a public defender protected Brown's constitutional right to counsel. However, the appointment was not sufficient by itself "to ensure that his constitutional rights [were fully] protected," because "Brown [was] also constitutionally entitled to ... the basic tools of an adequate defense." *Id.*

Citing *Ake v. Oklahoma*, 470 U.S. 68 (1985), the court explained that the right to the basic tools of an adequate defense "is not contingent upon the appointment of Department counsel; it is inherent under the state and federal Constitutions." *Brown*, 134 P.3d at 757, 759. The court found that, by denying the request for expert funds, the lower court "'fail[ed] to give full recognition to Brown's constitutional right to [counsel's] representation as his *pro bono* counsel,'" and also denied Brown his "'constitutional right as an indigent [defendant] to obtain the basic tools of an adequate defense at public expense.'" *Id.* (quoting *New Mexico v. Brown*, 87 P.3d 1073, 1083-84 (N.M. Ct. App. 2004) (Vigil, J., dissenting) (alteration in original)). The court concluded that the denial of public funds for expert witnesses in Brown's defense "compromised" his constitutional rights, and provided "a strong constitutional basis" for reversing the decision below. *Brown*, 134 P.3d at 759.

Although *Brown* concerned a defendant with pro bono representation, the court's constitutional analysis

appears to support a rule mandating state assistance where the indigent criminal defendant pays for or partially pays for private representation.[4] To support its decision, the court cited cases from the "majority of" its sister states, which had ruled that "indigent defendants represented by *pro bono* or *retained counsel* [were] entitled to state funding for various defense costs, including expert witness fees." Id. at 759 (second emphasis added). Even more significantly, the court stated that "[t]reating similarly situated indigent defendants the same under the law will promote the 'fair administration of justice' and ensure that constitutional and statutory obligations are satisfied." *Id.* at 761. *Brown* correctly emphasized that the constitutional rights at issue are triggered by a criminal defendant's indigence – not by the status of the defendant's attorney. Accordingly, the application of *Brown's* constitutional analysis to indigent defendants with private counsel seems logical, if not inevitable.

2. *Washington: State v. Punsalan*

Washington v. Punsalan, 133 P.3d 934 (Wash. 2006), decided ten days after *Brown*,[5] further illustrates the unsettled nature of the important legal issues involved in Petitioner's case. Defendants Rodin Punsalan and Chayce

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[4] The court in *Brown* noted that its facts could be distinguished from a previous intermediate appellate court decision in *Subin v. Ulmer*, 36 P.3d 441 (N.M. Ct. App. 2001), where the lower court had denied expert fees to an indigent defendant represented by private counsel retained by the defendant's family. *Brown*, 134 P.3d at 758-59. The *Brown* opinion did not reach the question of whether its holding would also apply to private counsel not acting on a pro bono basis, and so the continued viability of *Subin v. Ulmer* remains unsettled.

[5] This opinion was issued on May 4, 2006, the same day Moore's Petition for a Writ of Certiorari was filed.

Arden Hanson were charged with first degree robbery and manslaughter, respectively.[6] Both defendants were found to be indigent and both were represented by private counsel retained by family members. In addition, both defendants sought funds from the public defender's office to pay for expert witnesses and both requests were denied because defendants were represented by private counsel rather than the public defender's office. *Id.* at 934-35.

The Washington Supreme Court reversed and remanded both cases. *Id.* at 936. The court noted that, under *Ake*, "[t]he Sixth Amendment right to effective assistance of counsel includes expert assistance necessary to an adequate defense." *Id.* at 935 (citing *Ake*, 470 U.S. at 72). To meet this constitutional obligation, Washington Superior Court Criminal Rule 3.1 provides state funding for "'services necessary to an adequate defense.'" *Punsalan*, 133 P.3d at 935 (quoting Wash. Super Ct. Crim. R. 3.1). Because the plain language of the rule does not distinguish between appointed and private counsel, the court concluded that indigent criminal defendants represented by appointed, paid, and pro bono counsel are equally entitled to state funding for necessary expert services. *Punsalan*, 133 P.3d at 935. Although *Punsalan* analyzed a state court rule, the court recognized the constitutional issues at stake and made clear that the defendants' Sixth Amendment rights must be protected. *Id.* at 935-36 ("[The] Sixth Amendment supports 'the right to select and be represented by one's preferred attorney.'") (quoting *Wheat v. United States*, 486 U.S. 153, 159 (1988)).

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[6] Defendants' cases were consolidated on appeal to decide the issue of state funding for expert witnesses. *Punsalan*, 133 P.3d at 935.

3. *United States v. Gonzalez-Lopez*

Finally, this Court very recently issued an opinion in *United States v. Gonzalez-Lopez*, No. 05-352 (June 26, 2006). There, the defendant was deprived of retained counsel of his choice. Slip Op. at 1-4. The Court concluded that this deprivation violated the defendant's Sixth Amendment right to assistance of counsel. Slip Op. at 6. In further concluding that the violation amounted to a structural error not susceptible to harmless error analysis, the Court explained how having counsel of one's choice affected "myriad aspects of representation":

> Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial.

Id. at 9.

The scope of this crucial right is directly implicated by the state court decisions whose disagreements the Court should reconcile by granting review in this case. Moore was denied funds for expert assistance because, though indigent, he had retained private counsel. Although the Sixth Amendment "commands . . . that the accused be defended by the counsel he believes to be best," *Gonzalez-Lopez* at 5, the decision below, and similar decisions in some other states, force defendants to choose between that fundamental right and the right to expert assistance. Requiring such a choice impermissibly narrows the right described in *Gonzalez-Lopez*.

CONCLUSION

Brown, Punsalan, and *Gonzalez-Lopez* cast into sharp relief the first important federal question presented in Moore's Petition. The two new state court opinions illustrate the continuing uncertainty among the state courts as to the scope of constitutional protections afforded indigent criminal defendants with private counsel. This Court's opinion in *Gonzalez-Lopez* emphasizes that defendants are entitled to retained private counsel of their choice, but the vitality of that right in state courts will remain in doubt until Moore's first question presented is resolved.

For the foregoing reasons, and those stated in the Petition, Moore's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

W. BRADLEY NEY
1200 New Hampshire Ave., N.W.
Washington, DC 20036
(202) 776-2280

ALBERT H. TURKUS
Counsel of Record
KENNETH W. GIDEON
JULIA M. KAZAKS
DONALD P. SALZMAN
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7000

Attorneys for Petitioner Frederick James Moore

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IN THE
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FREDERICK JAMES MOORE,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

On Petition for a Writ of Certiorari
To The Maryland Court of Appeals

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Of Counsel:
PAMELA HARRIS, Co-Chair
Amicus Committee
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1625 I Street, NW
10th Floor
Washington, D.C. 20006
Tel: 202-383-5386

WILLIAM F. SHEEHAN
Counsel of Record
JOHN MOUSTAKAS
ANNE M. SMETAK
GOODWIN | PROCTER LLP
901 New York Avenue, NW
Washington, D.C. 20001
Tel: 202-346-4000

Counsel for *Amicus Curiae*

July 6, 2006

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with a membership of more than 11,200 attorneys and 28,000 affiliate members in fifty states, including private criminal defense lawyers, public defenders, and law professors. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practices, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

This case raises important questions concerning an indigent criminal defendant's right to a DNA expert. NACDL offers its practical view of why defendants incriminated by DNA evidence need their own experts, and then addresses the important question whether indigent defendants may be forced to choose between their right to an expert and their right to counsel of their choice.

SUMMARY OF ARGUMENT

DNA evidence is used with increasing frequency in criminal prosecutions and is typically accorded heavy evidentiary weight. But DNA testing is not infallible. Test samples may be mislabeled or contaminated, and test results may be skewed or misinterpreted by human error. To mount a meaningful defense when incriminated by DNA evidence, criminal defendants must have an independent expert who can

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[1] No counsel for any party had any role in authoring this brief, and no one other than the *amicus curiae* and its counsel made any monetary contribution to its preparation or submission. The parties have consented to the filing of this brief in letters of consent on file with the Clerk.

retest the DNA evidence, review the prosecution's test data for errors, aid defense counsel in cross examination, and testify as to the uncertainty in DNA testing. For these reasons, expanded on below, the Maryland Court of Appeals correctly assumed that the due process right articulated in *Ake* v. *Oklahoma*, 470 U.S. 68 (1985), requires that states provide necessary DNA experts to indigent criminal defendants.

The Maryland court erred, however, in holding that only indigent criminal defendants who are represented by the State's Public Defender's Office may obtain necessary State-appointed experts. That ruling impermissibly forces an indigent defendant to choose between his Sixth Amendment right to counsel and his due process right to present an adequate defense. See *Simmons* v. *United States*, 390 U.S. 377, 394 (1968). It also violates the Equal Protection Clause, because it impinges on the fundamental right to counsel without serving any compelling government interest. See *Ill. Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 185 (1979).

The population of indigent defendants who for one reason or another secure representation by private counsel is not small. The constitutional issue presented by this case is thus recurring as well as important, and warrants this Court's review.

ARGUMENT

We show in Part I below that DNA evidence is subject to human error and that, without an independent DNA expert, criminal defendants may be convicted by faulty DNA test results. In Part II, we show that Maryland improperly requires indigent criminal defendants to choose between their due process right to a DNA expert and their Sixth Amendment right to retain counsel of their choice.

I.

Criminal Defendants Need an Independent Expert To Mount a Meaningful Defense to DNA Evidence.

When DNA evidence first entered courtrooms in the late 1980s, it was heralded as "the single greatest advance in the 'search for truth,' and the goal of convicting the guilty and acquitting the innocent, since the advent of cross-examination." *People* v. *Wesley*, 533 N.Y.S.2d 643, 644 (Albany County Ct. 1988). Courts proclaimed that its reliability "justifie[d] an aura of amazement," *United States* v. *Jakobetz*, 747 F. Supp. 250, 263 (D. Vt. 1990), and experts argued that a false match — a test result that incriminated an innocent defendant — was impossible.[2]

Not surprisingly, the use of DNA evidence in criminal trials has increased dramatically in the past two decades. In 1996, about half of all state prosecutor's offices used DNA evidence in felony trials or plea negotiations; by 2001, two-thirds did.[3] DNA evidence has been admitted in almost every jurisdiction, Moriarty § 11:45, and has gained such standing in the criminal justice system that DNA evidence alone may convict or exonerate a defendant.[4]

A. DNA Testing Is Subject to Human Error.

Despite the early claims made for it, DNA testing is not infallible. With growing use in the criminal justice system

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[2] Jane Campbell Moriarty, Psychological and Scientific Evidence in Criminal Trials § 11:38 n.3 (2003) [hereinafter Moriarty].

[3] Carol J. DeFrances, Bureau of Justice Statistics, Prosecutors in State Courts, 2001, at 1 (2002) [hereinafter DeFrances].

[4] See, *e.g.*, *Roberson* v. *State*, 16 S.W.3d 156, 170 (Tex. App. 2000); The Innocence Project, *Causes and Remedies of Wrongful Convictions*, http://www.innocenceproject.org/causes/index.php (last visited May 2, 2006).

has come growing evidence of its limits. DNA evidence has been called into question or proven faulty in numerous cases around the country, and in fact false matches and flawed DNA test results have resulted in the conviction of innocent individuals.[5] Understanding how this can happen requires a brief description of the DNA testing process.

1. DNA Testing Primer

Each human sex cell, a sperm or an ovum, contains twenty-three chromosomes.[6] When a sperm and ovum combine into a fertilized cell, that cell contains forty-six chromosomes, matched up into twenty-three pairs — the number one chromosome from the father pairs with the number one chromosome from the mother, and so on. The chromosomes are replicated as the fertilized cell divides, until almost every cell in a human's body contains copies of the twenty-three pairs. The chromosomes contain all of the genetic information that makes us human and individual.

Each chromosome is made up of a DNA (deoxyribonucleic acid) molecule. Long and double-stranded, DNA molecules

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[5] See, *e.g.*, William C. Thompson et al., *How the Probability of a False Positive Affects the Value of DNA Evidence*, 48 J. Forensic Sci. 1, 2–3 (2003); William C. Thompson, *Tarnish on the 'Gold Standard': Understanding Recent Problems in Forensic DNA Testing*, 30 Champion 10, 10–12 (2006) [hereinafter Thompson, *Gold Standard*]; Adam Liptak, *You Think DNA Evidence Is Foolproof? Try Again*, N.Y. Times, Mar. 16, 2003, § 4, at 5 [hereinafter Liptak]. For sources documenting errors in DNA testing, see *DNA Testing Problems*, Scientific Testimony, http://www.scientific.org/DNAProblems/DNA-Problems.htm (last visited May 11, 2006).

[6] Unless otherwise indicated, all of the information provided in the next two paragraphs comes from David H. Kaye & George F. Sensabaugh, Jr., *Reference Guide on DNA Evidence*, *in* Federal Judicial Center, Reference Manual on Scientific Evidence 491–93, 560 app. pt. A (2d ed. 2000), *available at* http://www.fjc.gov/public/home.nsf/pages/16 [hereinafter Federal Judicial Center].

are shaped like twisted ladders or double helixes. Along the length of each DNA strand, four organic building-block substances, called "bases" and abbreviated as A, T, G, and C, combine in pairs. The order in which the base pairs occur along the length of a DNA molecule dictates the genetic makeup of each individual.

The order of base pairs is identical in over 99% of the DNA in every human. That is, over 99% of the genetic makeup of every human is identical. But scientists have identified specific locations on DNA strands where the order of base pairs can differ, leading to different and distinctive genetic makeups. For instance, at a certain location on the DNA found in the fifteenth chromosome, base pairs may be ordered in a number of different ways, which may account for differences in eye color. The particular ordering of base pairs at a particular DNA location is called an allele (rhymes with Camille). Because each individual has two fifteenth chromosomes, one from each parent, there are two alleles at that location. An individual with allele A on the DNA from his maternal fifteenth chromosome and allele B on the DNA from his paternal fifteenth chromosome may have blue eyes, while someone with alleles C and D may have brown eyes.

DNA tests compare the specific locations on DNA strands where base pairs can differ between individuals. If DNA samples do not have the same two alleles at each tested location, they could not have come from the same source. If the samples do have the same alleles at each tested location, the samples are a match — meaning that it is possible they came from the same source. Moriarty §§ 11:4, 11:6. Because a DNA test compares only certain locations on two individuals' DNA strands, it cannot determine conclusively

that the two samples came from the same source, only that it is *possible* that they did.[7]

The most common form of DNA testing is called the short tandem repeat, or STR, test. *Id.* § 11:22.[8] It can be performed using only trace amounts of DNA, which are then amplified, or replicated, using a method called polymerase chain reaction or PCR. *Id.* § 11:6. The FBI has identified as appropriate for STR testing thirteen of the specific locations on DNA strands where base pairs can differ between individuals. *Id.* Commercial kits amplify traces from those locations using PCR.[9] As the kits amplify the DNA, they label the specific locations on the DNA to be tested with colored dyes. An automated test process then "reads" the DNA and generates graphs that show the alleles at each tested location. *Id.* § 11:25. An analyst compares the graphs to determine whether the samples have the same alleles.

If the samples are a match, the DNA analyst, using databases containing the genetic profiles of many individuals, prepares a "frequency estimate" — in lay terms, an assessment of the probability that a match is the product of random chance. *Id.* §§ 11:35, 11:36. By counting the number of times alleles occur at a particular location, and controlling for racial differences, the analyst can determine the probability that two random individuals from the same racial group would have the same alleles at all matching locations. The analyst may come up with a frequency estimate that only

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[7] Jonathan J. Koehler, *DNA Matches and Statistics: Important Questions, Surprising Answers*, 76 Judicature 222, 224 (1993).

[8] The STR test was used by the prosecution's expert in this case. Record at T4-60–61.

[9] The prosecution's expert in this case used the ProfilerPlus kit, which tests nine of the thirteen locations. Record at T4-60–62.

one individual in millions or billions would randomly match in the same way. See *id.* § 11:36.

Every DNA test includes procedural controls that are supposed to guard against faulty results due to contamination. Contamination occurs when an alternate source of DNA is added to the original sample and can result in a false match because the test will reveal alleles other than those originally present. See Federal Judicial Center, at 514–15. Even when such controls are effective, however, they cannot catch errors such as the mislabeling of samples. Mislabeling occurs when a DNA sample is wrongly identified and may result in a false match because the test literally tests another person's DNA. *See id.* at 512.

2. The Potential for and Occurrence of Error

Errors resulting from mislabeled or contaminated DNA samples "appear to be chronic and occur even at the best DNA labs." Thompson, *Gold Standard*, at 11. Documented instances have occurred in California, Maryland, Minnesota, Nevada, North Carolina, Pennsylvania, Texas, and Washington.[10] One Washington State laboratory "contaminated tests or made other mistakes while handling DNA evidence in at least 23 cases involving major crimes over the last three years."[11] And files from the Orchid-

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[10] See, *e.g.*, Thompson, *Gold Standard*, at 10–11; Ruth Teichroeb, *Rare Look Inside State Crime Labs Reveals Recurring Problems 23 Cases in 3 Years Had DNA Test Errors*, Seattle Post-Intelligencer, July 22, 2004, at A1 [hereinafter Teichroeb]; Phoebe Zerwick, *DNA Mislabeled in Murder Case*, Winston-Salem J., Aug. 28, 2005; Pheobe Zerwick, *Mixed Results: Forensics, Right or Wrong, Often Impresses Jurors*, Winston-Salem J., Aug. 29, 2005.

[11] "Forensic scientists tainted tests with their own DNA in eight of the 23 cases. They made mistakes in six others, from throwing out evidence swabs to misreading results, fingering the wrong rape suspect." Teichroeb, at A1.

Cellmark laboratory in Germantown, Maryland, which performed the DNA testing in the case at bar, "show dozens of instances in which samples were contaminated with foreign DNA or DNA was somehow transferred from one sample to another during testing." Thompson, *Gold Standard*, at 11.

Many such errors are traced to DNA laboratories that are overworked and undersupervised.[12] Labs often have caseloads that vastly exceed their capabilities, leading analysts to rush test results.[13] Many DNA labs are not subject to regulation or mandatory accreditation requirements,[14] and in 2004 the *Chicago Tribune* reported that "evidence of problems ranging from negligence to outright deception has been uncovered at crime labs in at least 17 states."[15]

Perhaps the most notorious DNA lab was the Houston Police Department's. An outside investigator found "pervasive problems" in 40% of the reviewed tests, including failures to report exculpatory evidence, misleading reports of the statistical significance of DNA profiling results, and the absence of proper controls.[16] Dozens of DNA retests failed to

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[12] J. Herbie DiFonzo, *The Crimes of Crime Labs*, 34 Hofstra L. Rev. 1, 2–4 (2005) [hereinafter DiFonzo]; Thompson, *Gold Standard*, at 12.

[13] See Greg W. Steadman, Bureau of Justice Statistics, Survey of DNA Crime Laboratories, 2001, at 2 (2002). "Some labs have become high-tech sweatshops * * *." Thompson, *Gold Standard*, at 12.

[14] DiFonzo, at 3–4. As of May of 2006, only 313 crime laboratories, out of more than 1,000 nationwide, have been accredited with the American Society of Crime Laboratory Directors. Am. Soc'y of Crime Lab. Dirs., Lab. Accreditation Bd., Laboratories Accredited by ASCLD/LAB, http://www.ascld-lab.org/legacy/aslablegacylaboratories.html (last visited May 30, 2006).

[15] Maurice Possley et al., *Scandal Touches Even Elite Labs: Flawed Work, Resistance to Scrutiny Seen Across U.S.*, Chi. Trib., Oct. 21, 2004.

[16] Michael R. Bromwich, Independent Investigator, Fourth Report of the Independent Investigator for the Houston Police Department Crime

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confirm the tests of the Houston lab, and later testing proved the innocence of two men "falsely incriminated by botched lab work." Thompson, *Gold Standard*, at 10.

Even in the best-run lab under the best of conditions, a test of an uncontaminated, properly labeled DNA sample may result in a false positive, for DNA analysts have substantial leeway to make subjective judgments during the testing process.[17] An analyst testing a sample with DNA from more than one contributor must make judgments about which alleles are from a primary contributor, whether any contributors share alleles, and whether unexpected alleles are from an alternate contributor or other sources.[18] Moriarty §§ 11:6, 11:26. The analyst may create a false profile based on a combination of alleles from two contributors, or exclude the actual perpetrator from the test result. *Id.* § 11:26. A test may show fewer than the expected number of alleles and an analyst may be forced to "simply guess whether all alleles have been detected or not." *Id.* Or a test may show more than the expected number of alleles, possibly reflecting a flaw in the testing process, a misread of the test by the software, or any number of random factors. *Id.*

Errors in DNA testing may result from more than accidental contamination and mislabeling. Many DNA analysts were trained as law enforcement officers, many public labs are closely aligned with police departments,[19] and

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Laboratory and Property Room 5–6 (Jan. 4, 2006), *available at* http://www.hpdlabinvestigation.org/reports/060104report.pdf.

[17] The subjective judgments discussed herein refer to those required to perform an STR test, the test used by the prosecution's expert in this case.

[18] Many of the DNA samples tested in the case at bar were mixed. Record at T4-102–14, T4-155–59.

[19] State crime labs, which were used for DNA testing by 82% of full-time medium state prosecution offices, DeFrances, at 8–9, are "funded with

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private labs may receive substantial compensation by the prosecution for their analysis.[20] Analysts may be privy to details of the prosecution's theory of the case and the expected outcome of the test, or consider information outside the realm of scientific knowledge. For instance, one DNA analyst's notes read: "Suspect -- known crip gang member — keeps 'skating' on charges — never serves time. This robbery he gets hit in head with bar stool — left blood trail. [Detective] Miller wants to connect this guy to scene w/ DNA * * *." Moriarty § 11:24 (quotation omitted). Moreover, given the necessarily subjective judgments called for in some cases, DNA analysts may unconsciously tilt their findings to support the prosecution's theory.[21]

In some cases intentional falsification occurs. An analyst may "fak[e] test results to cover up errors arising from cross-contamination of DNA samples and sample mix-ups." Thompson, *Gold Standard*, at 12. Indeed, analysts have been "fired for scientific misconduct, and specifically for falsification of test results," from laboratories operated by the FBI, the Chief Medical Examiner in New York City, the U.S. Army, and private enterprises. *Id.* at 11–12. A DNA analyst in the FBI laboratory failed to use proper controls and falsified laboratory reports (*id.* at 12), "render[ing] over two years worth of her STR work scientifically invalid and

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criminal justice dollars, and often physically located in police buildings." DiFonzo, at 10–11.

[20] See Moriarty § 11:60. The laboratory in this case was paid more than $30,000 by the prosecution. Record at T4-133.

[21] See D. Michael Risinger et al., *The* Daubert/Kumho *Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 Cal. L. Rev. 1, 35–42 (2002).

unsuitable for use in court."[22] A West Virginia State DNA analyst was found to have a "long history of falsifying evidence in criminal prosecutions." *In re Investigation of the W. Va. State Police Crime Lab.*, 438 S.E.2d 501, 503 (W. Va. 1993).

B. An Independent Expert Protects Against Error.

The only meaningful defense against the kind of errors described above is an independent DNA expert. Such experts perform a number of crucial functions in challenging incriminating DNA evidence. To start, a defense expert can independently test a DNA sample. Although DNA tests are rife with uncertainty, it is "implausible that two laboratories would reach the same false results."[23] Accordingly, a second test performed by an independent expert is "[a] wrongly accused person's best insurance against the possibility of being falsely incriminated."[24]

If sufficient DNA samples are not available for retesting, an expert can assist defense counsel in understanding the underlying science and reviewing the prosecution's test data for errors.[25] The complexity of DNA testing is such that it is "difficult if not impossible for a lawyer to evaluate the

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[22] Office of the Inspector Gen., U.S. DOJ, The FBI DNA Laboratory: A Review of Protocol and Practice Vulnerabilities 47 (May 2004), *available at* http://www.usdoj.gov/oig/special/0405/final.pdf.

[23] William C. Thompson, *DNA Evidence in the O.J. Simpson Trial*, 67 U. Colo. L. Rev. 827, 844 (1996).

[24] Nat'l Research Council, Nat'l Acad. of Sciences, The Evaluation of Forensic DNA Evidence 87 (1996).

[25] See John Devlin, *Genetics and Justice: An Indigent Defendant's Right to DNA Expert Assistance*, 1998 U. Chi. Legal F. 395, 406–07 (1998) [hereinafter Devlin].

evidence without expert assistance."[26] An expert's review of the underlying data may reveal improper analysis, contaminated or mislabeled samples, or a failure of test controls. See Moriarty § 11:24. And even if no errors are obviously apparent, "effective cross-examination of a prosecution expert frequently requires the advice of a defense expert."[27]

A defense expert may also provide meaningful information to the jury about the strengths and weaknesses of DNA evidence. Without an understanding of the limitations of DNA tests, jurors may give undue weight to the prosecution's evidence. "DNA analysis and the resulting statistics can be extremely convincing evidence to jurors who have heard hours of expert testimony and statistics regarding the improbability of misidentification or other errors in the procedure." *Dubose* v. *State*, 662 So. 2d 1189, 1196–97 (Ala. 1995) (citation omitted). A defense DNA expert can inform the jury about the inherent limitations in DNA testing, point out potential problems in the gathering or testing of such evidence, and provide jurors with a better understanding of the statistics cited by prosecution experts.[28]

As the court below recognized, access to the prosecution's expert is no substitute for an independent defense expert. Pet. App. 42a–48a. Perhaps most important, access to the

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[26] William C. Thompson et al., *Evaluating Forensic DNA Evidence: Essential Elements of a Competent Defense Review*, 27 Champion 24, 26 (2003) [hereinafter Thompson, *Essential Elements*]; *see also* Nat'l Research Council, Nat'l Acad. of Sciences, DNA Technology in Forensic Science 147 (1992); Moriarty § 11:1.

[27] Paul C. Giannelli, Ake v. Oklahoma*: The Right to Expert Assistance in a Post*-Daubert*, Post-DNA World*, 89 Cornell L. Rev. 1305, 1376 (2004) [hereinafter Giannelli].

[28] See, *e.g.*, Moriarty §§ 11:38, 11:39; Devlin, at 405–08; Thompson, *Essential Elements*, at 27–28.

prosecution's expert does not allow for an independent retest of a DNA sample. Moreover, many prosecution DNA experts whose labs may be closely aligned with law enforcement or who may have significant financial incentives to defend their results may be disinclined to assist the defense.[29] Finally, as this Court has recognized, the "appropriate means of attacking shaky but admissible evidence" include "[v]igorous cross-examination" and "presentation of contrary evidence," *Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993), both of which can be done only with the assistance of a defense DNA expert.

Defense use of DNA experts also furthers the societal interest in the accuracy of DNA testing. Widespread access by defendants to DNA experts can help to expose systemic laboratory and analyst errors, and to ensure the validity of DNA evidence used at trial. As one director of a DNA laboratory noted, "[r]esources must be made available" to the defense to analyze DNA evidence because "[i]f you want the best crime lab, you need to have the best criminal defense attorneys to challenge us." Liptak, at 5. Indeed, some of the worst laboratory abuses have occurred in jurisdictions that regularly fail to provide DNA experts to defendants. Thompson, *Gold Standard*, at 11.

II.
Petitioner's Constitutional Right to an Expert Cannot Be Conditioned on Relinquishment of His Constitutional Right to Counsel.

In light of the foregoing, the Maryland Court of Appeals correctly held that the rationale of *Ake* v. *Oklahoma*, 470 U.S. 68, 74 (1985), extends to defense DNA experts because "[d]ue process and equal protection require the State to provide non-psychiatric experts to indigent defendants when

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[29] Moriarty § 11:60; Giannelli, at 1378 & n.482.

the defendant makes a particularized showing of the need for assistance of such experts." Pet. App. 27a. The court erred, however, in holding that the State may condition the exercise of Petitioner's right to expert services on the relinquishment of his Sixth Amendment right to counsel.

The State refused to provide Petitioner with the assistance of a DNA expert in this case not because Petitioner did not qualify as indigent, but because he was not represented by the public defender. Pet. App. 42a.[30] The Maryland Court held that the Constitution permits that result: "While such defendants may face difficult choices, the Constitution does not bar the State of Maryland from requiring them to choose between counsel of their choice and ancillary services provided by the [public defender]." *Id.* at 41a.

That was incorrect. Indigent defendants may not be required to surrender one constitutional right — the Sixth Amendment right to counsel of choice — in order to avail themselves of another — the due process right to present a meaningful defense, here by way of a defense DNA expert. That is the clear teaching of *Simmons* v. *United States*, 390 U.S. 377 (1968), which held that a defendant who wished to challenge an allegedly unconstitutional search could not be required, as a condition of the challenge, to admit ownership of the property in which the incriminating evidence was found. Such a requirement, the Court held, would put a defendant to an unconstitutional choice: "either to give up what he believed * * * to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination." *Id.* at 394. It was "intolerable,"

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[30] Petitioner initially passed the public defender's test for indigency before he acquired the funds needed to retain his counsel. Pet. App. 6.

the Court concluded, that "one constitutional right should have to be surrendered in order to assert another." *Id.*[31]

In departing from that rule, the court below devalued the Sixth Amendment right at stake by mistakenly relying on cases involving ***appointed*** rather than ***retained*** counsel. See Pet. App. 40a (quoting *Fawlkes* v. *State*, 536 A.2d 1149, 1159 (Md. 1988) ("for indigent defendants * * * the right to counsel is but a right to effective legal representation; it is not a right to representation by any particular attorney")). The difference is critical. An indigent defendant for whom counsel is appointed has a limited right to counsel of choice because the State pays for the representation. See *Wheat* v. *United States*, 486 U.S. 153, 159 (1988) (the Sixth Amendment protects "the right to select and be represented by one's preferred attorney" but "a defendant may not insist on representation by an attorney he cannot afford"). By contrast, a defendant like Petitioner, indigent or not, who ***retains*** his own counsel has a virtually absolute right to counsel of his choosing. See *United States* v. *Gonzalez-Lopez*, No. 05-352, slip op. at 3–4, 9 (U.S. June 26, 2006) (deprivation of right to counsel of choice constitutes "structural error"); *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 624–25 (1989) ("[T]he Sixth Amendment guarantees a defendant the right to be

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[31] *Accord United States ex rel. Wilcox* v. *Johnson*, 555 F.2d 115, 120 (3d Cir. 1977) (when defendant's due process right to testify requires him to give up his Sixth Amendment right to counsel, "both rights are corrupted"); *United States* v. *Scott*, 909 F.2d 488, 493 (11th Cir. 1990) (trial judge "impermissibly forced defendant to choose between two constitutional rights: the right to testify and the right to counsel"); *United States* v. *Herrera-Ochoa*, 245 F.3d 495, 499–500 (5th Cir. 2001) (using physical presence at trial to establish immigration violation impermissibly pitted defendant's "Sixth Amendment right to be present at trial [against] his Fifth Amendment due process right that the government prove each and every element of the offense * * * beyond a reasonable doubt").

represented by an otherwise qualified attorney whom [the] defendant can afford to hire, or who is willing to represent the defendant even though he is without funds.").[32]

These holdings reflect the fundamental importance of the right to counsel of one's choice. Choosing counsel may well be the most important decision a defendant makes in shaping his defense. "Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument." See *Gonzalez-Lopez*, slip op. at 9. The defendant's choice "will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial." *Id.* Moreover, choosing one's own counsel fosters the trust between attorney and client that is necessary for the attorney to be a truly effective advocate. See ABA Standards for Criminal Justice § 4-3.1 cmt. at 4-29 (2d ed. 1980). Honoring that choice shows the "'respect for the individual which is the lifeblood of the law.'" *Faretta* v. *California*, 422 U.S. 806, 834 (1975) (quoting *Illinois* v. *Allen*, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring)).

The court below thus erred in relying on language in *Ake* cautioning that an indigent defendant's right to a state-funded psychiatric expert does not translate to a "'constitutional right to choose a psychiatrist of his personal liking.'" Pet. App. 37a (quoting *Ake*, 470 U.S. at 83). Petitioner is not claiming that the State must provide him with a DNA expert of his "personal liking." But the State must provide him with expert

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[32] There are exceptions when the integrity of the judicial process is threatened, but none applies here. See, *e.g.*, *United States* v. *Mullen*, 32 F.3d 891, 897 (4th Cir. 1994) (choice can be overriden when it is "manipulated to delay proceedings or hamper the prosecution" (quotation omitted)).

DNA assistance of some sort — as the court below properly held — and it may not deny him that right simply because he refuses to forfeit his fundamental right to retained counsel of choice. The State may no more condition the exercise of Petitioner's *Ake* right on abandoning his retained counsel than it could on relinquishing his right to a jury trial.

The decision below is incorrect not only under *Simmons* but also under a straightforward equal protection analysis. By treating differently indigent defendants who are represented by retained counsel from those who are represented by the public defender, and providing necessary expert assistance to the latter but not the former, the State has impinged on the fundamental constitutional right to counsel. See *Gonzalez-Lopez*, slip op. at 7 (right to choose counsel is "the root meaning of the [Sixth Amendment's] constitutional guarantee"). That different treatment may be justified only if it is necessary to promote a compelling governmental interest. *E.g.*, *Ill. Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 185 (1979); *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969). But the State has advanced no compelling governmental interest that could justify the burden imposed on Petitioner's right to counsel of choice.

Indeed, the decision below advances virtually no rationale for conditioning the right to expert assistance on the forfeiture of the right to retained counsel of choice. Nor is any rationale readily apparent. If the State is worried about protecting its fisc while still permitting eligible defendants access to expert assistance, it could establish expert fee schedules and limits, cap the amount of fees, or require pre-approval of fees.[33] Or the State could put competent experts on retainer and make

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[33] Concern for the public fisc is hardly a compelling governmental interest here because every defendant allowed modest fees for expert services saves the State the greater expense of appointed counsel. See, *e.g.*, *State* v. *Handson*, 689 A.2d 1081, 1083–84 (Vt. 1996).

them available to indigent defendants regardless of the status of their counsel. And "guaranteeing expert assistance to indigent criminal defendants represented by private counsel * * * poses little risk of abuse because evaluation of the necessity of requested expert assistance to an adequate defense would remain within the discretion of the trial judge." *State* v. *Punsalen*, No. 77490-1, slip op. at 4 (Wash. Sup. Ct., May 4, 2006).

In short, there is no justification — let alone one weighty enough to override the Sixth Amendment right to retained counsel of choice — for a state policy that requires defendants to relinquish their right to retained counsel of choice in order to exercise their *Ake* right to necessary expert assistance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PAMELA HARRIS, Co-Chair
Amicus Committee
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1625 I Street, NW
Washington, D.C. 20006
Tel: 202-383-5386

WILLIAM F. SHEEHAN
Counsel of Record
JOHN MOUSTAKAS
ANNE M. SMETAK
GOODWIN | PROCTER LLP
901 New York Avenue, NW
Washington, D.C. 20001
Tel: 202-346-4000

Counsel for *Amicus Curiae*

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